FILED
NOV 28 1951
CHARLES ELMORE CROPLEY

IN THE

Supreme Court of the United States

OCTOBER TERM, 1951

No. 397

UNITED STATES OF AMERICA,
Petitioner,

versus

STATE ROAD DEPARTMENT OF FLORIDA, ET AL.,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit.

BRIEF FOR RESPONDENTS IN OPPOSITION.

RICHARD W. ERVIN, JR.,
Attorney General of Florida,
T. PAINE KELLY,
Assistant Attorney General,
JOHN W. McWHIRTER,
Attorney for State Road Department,
J. McHENRY JONES,
P. O. Box 732,
Pensacola, Florida,
Attorney for Respondents.

HERBERT LATHAM,
JOE J. HARRELL,
Of Counsel for Respondents.

INTR

STAT

QUES

ARGU

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T

C

INDEX

	PAGE
DUCTION	1
MENT OF THE CASE	2
IONS PRESENTED	3
MENT	4
ion I	4
e Trial Court did not err in holding that ordinary care under conditions existing was a high degree of care due to the clear signs of an impending storm	4
C. A. opinion holding applicable law properly applied to facts by trial judge	4
Collision of a ship with a bridge or other immovable object requires the navigator of the ship to explain the occurrence or suffer a judgment against the owner of the ship	7
The doctrine of Res Ipsa Loquitur is applicable under the law of Florida in a case where a ship collides with a bridge	8
Findings of Facts by the Court as to matters prior to arrival of squall	9
Findings of Facts as to methods used to determine whether a ship is dragging; action generally deemed necessary by Masters under existing conditions and a general description of the squall	15

INDEX—Continued

PAGE

Discussion of the theory of the plaintiffs and testimony introduced in support thereof: 19
(1) The case against the SS Snelling 19
(2) The case against the SS Raleigh .. 20
(3) The case against the SS Blood 22
(4) The case against the SS Abbott ... 23
Discussion of the theory of the defendant and testimony introduced in support thereof: 24
The District Court's Conclusions of Law 27
The District Court's "Further Findings of Fact" and finding of negligence 34
Cases supporting the acts or omissions specifically found by the Court to be negligence:
Failure to heed warnings of bad weather until adrift 35
Waiting by mariners after storm broke and wasting time trying to tell whether ships were drifting instead of taking action 39
Allowing seaman on watch to go to sleep 23
Keeping Mate on continuous watch for 18 days (24 hrs. per day) without relief, in violation of law 47
Failure to promptly repair and replace fulcrum on Snelling 48
Failure to pay out more anchor chain and drop additional anchors 48
Failure to utilize steam seasonably 49

INDEX—Continued

PAGE

The declination of a Master and Mate of the Abbott to heed the warning of storm by engineer and wiper on watch 52

Drunkenness and stupidity of the Master of the Raleigh 53

Cases supporting the finding of the Court that defendant had failed to establish defense of vis major 54

Answer to Argument of Defendant and Analysis of Logs of Vessels anchored in Pensacola Bay 60

Question II 70

The cost of constructing and removing wooden bridges around those portions of the permanent bridge, which were negligently damaged by the defendant, in order to avoid the closing of arterial State and Federal Highway for a period of approximately one year, is recoverable by the State Road Department 70

The State has an inherent right to recover damages in its sovereign and corporate capacity for damages sustained by it, and it has designated the State Road Department by law to bring actions for damage to Highways. 74

The Statutes properly construed is not intended to limit the right of the State Road Department to recover damages to certain specific items 76

No conflict with C. C. A. case The Manhattan 85 F. 2d. 427, 429 (Aff. 10 F. Supp. 45) .. 82

INDEX—Continued

PAGE

Question III 83
State Road Department is authorized to sue by statute and under Federal Rules of Civil Procedure 17(a) need not join Aetna (subrogee) 83
Any non-joinder of Aetna was waived by failure to interpose seasonable motion 96
The entire question was rendered moot by amendment of Federal Tort Claims Act on April 25, 1949 and the Admiralty Extension Act is not applicable, suit under Federal Tort Claims Act having been previously filed 97
No conflict with C. C. A. case Yorkshire Ins. Co. v. U. S., 171 Fed. 2d 374 101

INDEX TO CASES

Anerly, The, 58 Fed. 794 .....43, 49, 68
Ash Sheep Co. v. U. S., 252 U. S. 159, 169, 64 L. Ed. 507, 40 S. Ct. 241 78
*Atlantic Coast Line v. Hendry, 112 Fla. 391, 150 So. 598 .....30, 59
*Atlantic Coast Line R. Co. v. Webb, 112 Fla. 449, 150 So. 741 69
*Atlantic Coast Line R. Co. v. Watkins, 97 Fla. 350, 121 So. 95 64
Bacchus, The, 267 Fed. 468 50
Baltic, The, Fed. Cas. No. 823, 2 Ben 452 32
Bailey v. Am. Tr. Co. 133 So. 331; 101 Fla. 42 99
Barge, The, 250 Fed. 476 .....17, 37, 44, 49

*Florida cases.

INDEX TO CASES—(Continued)

PAGE

Blow v. Joyner, 72 SE 319, 156 N. S. 140 75
Blackheath, The (DC, SD, Ala.) 154 Fed. 758 ....7, 18, 59
Box Leaf, The, 265 Fed. 803 .....45, 49
*Briggs v. Brown, 55 Fla. 417, 46 So. 325 80
British Isles, The, 264 Fed. 318 .....32, 38, 43, 49
Carr v. Hermosa Amusement Corp. (CCA 9th Circuit) 137 Fed. 2d 983 7
Cherente Steamship Co. v. U. S., 12 Fed. 2d 413 58
Chickie, The, 54 Fed. Supp. 17 7
Chico Bridge Co. v. Sacramenta Transportation Co., 123 Cal. 178, 55 Pac. 780 7
Clyde S. S. Co. v. U. S., 27 Fed. 2d 727 (2 CCA)17, 35, 39, 49
*Coaster Amusement Co. v. Smith, 141 Fla. 845, 194 So. 336 8
Comer v. Age-Herald Publishing Co., 44 So. 673, 151 Ala. 613 75
Cooper v. S. C. Highway Dept., 190 SE 499, 183 S. Car. 155 76
Cuff, Mary E., 84 Fed. 719 69
Cuidad de Reus, The, 185 Fed. 391 .....40, 46, 49, 51, 55
Cuyamel Fruit Co. v. Nedlund, (5 CCA), 19 Fed. 2d 489 46
David Dows 16 F. 154 32
*Davis v. Ivey, 93 Fla. 387, 112 So. 264 .....30, 59
Denali, The, 105 Fed. 2d 413, 416 (CCA 9) 48
Djerissa, The, 258 Fed. 947 .....17, 32, 36, 40, 49, 56, 68
Doleman v. Levine, 295 U. S. 221 55 S. Ct. 741, 76 L. Ed. 1402 92
Donnelly v. U. S., 276 U. S. 505, 48 S. Ct. 400, 72 L. Ed. 676 77
Drumcraig, The, 133 Fed. 804 .....17, 32, 38

*Florida cases.

INDEX TO CASES—(Continued)

PAGE

Eagle Oil Transport Co., Ltd. v. Bowers Southern Dredging Co. (5th CCA) 166 CCA 380, 255 Fed. 52 ..... 31, 59
Fasulo v. U. S., 272 U. S. 620, 47 S. Ct. 200, 71 L. Ed. 443, 445 77
Geo. W. Peavey, 183 F. 571, 106 CCA 117, Aff. 173 F. 715 32
Georgia v. Brailsford, 2 Dall. 402, 1 L. Ed. 433 74
Georgia v. Tennessee Copper Company, 27 S. Ct. 618, 206 U. S. 230, 51 L. Ed. 1038 74
Gleeson v. Va. Midland Ry. Co., 140 U. S. 435, text 444 30
Gooch v. United States, 297 U. S. 124, 56 S. Ct. 395, 80 L. Ed. 522 78
Green v. Western Union Telegraph Company, 49 SE 165, 136 N. C. 489 75
Grunson v. State, 89 Ind. 533, 47 Am. Rep. 178 76
Hackensack Trust Co. v. Vanden Berg, 97 A. 148, 88 N. J. L. 518 77
Havana, The, 89 Fed. 2d 23 ..... 7, 35, 55
Herm, The, 267 Fed. 375, (4 CCA) 47
Hunt v. State, 158 SE 703, 201 N. C. 37 90
Iselin et al. v. La Coste, 176 Fed. 2d 791 99
Jedburgh, The Baron, 299 Fed. 962 51
Jeffords v. Florence County, 162 SE 574, 165 S. Car. 15 75
Kenny, The Philip J., 60 Fed. 2d 457 36
King Lumber & Manufacturing Co. v. State, 143 So. 617 76
Konow, Carl, 64 Fed. 815 ..... 17, 37, 41, 49
Louisiana, The 3 Wall 174, 18 L. Ed. 85 ..... 32, 33
Lackawanna, The. 210 Fed. 264, 127 CCA 80 56

INDEX TO CASES—(Continued)

	PAGE
Mabey and Cooper, 14 Wall. 204	56
Maryland, The, 182 Fed. 829	56
Minch, Anna C., 260 Fed. 552, 271 Fed. 192	55
Moran, Edward, 180 F. 700, 104 CCA 552, Aff. 173 F. 109	32
Morning Light, The, 2 Wall. 550	58
*Mortellaro & Company v. Atlantic Coast Ry. Co., 91 Fla. 230, 107 So. 528	80
National Garment Co. v. N. Y. C. & St. L. R. Co., 173 Fed. 2d 32	95
Newa, The, 267 Fed. 115	32, 33, 41, 46, 49
O'Brien v. Delta Corporation, 178 So. 489, 188 La. 911	76
*Orme v. Burr, 157 Fla. 378, 25 So. 2d 870	8, 30
Pelotas, The, (US DC La.) 21 Fed. 2d 236	43, 49
*Peninsula Indus. Ins. Co. v. State, 55 So. 398, 61 Fla. 376	77
Pennsylvania, The, 65 U. S. 307, 24 How. 307, 16 L. Ed. 699	32
Penn. R. Co. v. Ropner, 105 Fed. 397	7
Pope v. Redding, 304 Pa. 326, 156 Atl. 106, 109	64
Radcliffe, W. I., 6 Fed. Supp. 783	42, 49
Richmond, The Dean, 107 Fed. 1001	7
Romero v. Atchinson, T&S F. Ry. Co., 72 Pac. 37, 11 N. Mex. 679	90
Ross v. Leggett, 28 N. W. 695, 61 Mich. 445	75
Rotan v. Maedgen, 59 SW 585, 24 Tex. Civ. App. 558	76
Sacramento Nav. Co. v. Salz, 273 U. S. 326, 47 S. Ct. 368, 71 L. Ed. 663, 666	78
Sands Springs Park v. Schraeder, 82 Okla. 244, 198 Pac. 983, 22 ALR 593	8
San Pedro, etc. v. U. S., 220 F. 737	32

* Florida cases.

INDEX TO CASES—(Continued)

PAGE

Sapphire, The, 11 Wall. 165 ..... 44, 49
Sarlls v. United States, 38 L. Ed. 556, 14 S. Ct. 720, 152 U. S. 570, 574 78
*Seaboard Airline Ry. Co. v. Watson, 94 Fla. 571, 113 So. 716 69
Sea King, The, 14 Fed. 2d. 684, 29 Fed. 2d. 5 .... 36, 41, 49
Sharpee She, The, 60 Fed. 928 38
Shell Oil Company v. Jackson County, Tex. Ct. Civ. App. 193 SW 2d. 268 79
*Skinner vs. Ochiltree, 5 So. 2d. 605, 148 Fla. 705 ... 8
State v. F. W. Fitch Company, 236 Iowa 208, 17 NW 2d. 380 79
South Carolina Highway Dept. vs. U. S., 78 Fed. Supp. 598, 171 Fed. 2d. 893 ..... 7, 16, 33, 35, 39, 46, 47, 49, 54
Southern Ry. Co. v. City of Rome, 176 SE 7, 179 ... 77
Southern Ry. v. U. S., 45 Ct. Cls. 322 32
State Highway Commission v. American Mutual Insurance Co., 146 Kan. 187, 70 P. 2d. 20 79
State ex rel Murray, for use and benefits of Sapulpa States Bank, v. Pure Oil Co., 169 Okla. 507, 37 Pac. 2d. 608 90
State ex rel St. Joseph Belt Ry. Co. v. Shain, 108 SW 2d. 351, 341 Mo. 733 76
Superior Minerals Co. v. Missouri Pac. Ry. Co., 45 SW 2d. 912 90
Terje Viken (The Bavaria) 212 Fed. 1021 ..... 17, 18, 32, 38, 42, 49
The Manhattan, 85 F. 2d. 427, (Aff. 10 F. Supp. 45) .. 82
Township of Denver, The v. White River Log Booming Co., 51 Mich. 472, 16 NW 817 90
Tungas, The, 5 Fed. 2d. 66 ..... 44, 49, 51

*Florida cases.

INDEX TO CASES—(Continued)

PAGE

United States v. Aetna Casualty and Surety Company, 338 U. S. 366, 70 S. Ct. 207, 94 L. Ed. 151 94
U. S. v. Bruce Dry Dock, 65 Fed. 2d. 938 ..... 31, 59
United States v. Giles, 300 U. S. 41, 57 S. Ct. 340 ... 78
U. S. v. Hill, 171 Fed. 2d. 404 89
United States vs. South Carolina Highway Dept., 171 Fed. 2d. 893 54
Union Steamship Co. v. The New York and Virginia Steamship Co., 24 How. 307 57
Vulcan, The, 60 Fed. Supp. 158 (D. C. La.) 7
Virginia Ehrman, The, and The Agnese, 24 L. Ed. 890, 97 U. S. 309 ..... 7, 55
Washer v. Bank of America, 123 P. 2d. 595 75
Western Union Telegraph Co. v. Lawson, 72 Pac. 283, 66 Kan. 660 76
Wettermark v. Campbell, 56 SW 331, 93 Tex. 517 ... 76
Wier v. Padre, 29 Fed. 335 37
Winans v. Chapman, 180 Pac. 266, 104 Kan. 664 75
Wood v. Franklin Ins. Co., 17 Fed. 2d. 80 99
Yaye Maru, 265 Fed. 850 37
Yorkshire Ins. Co. vs. U. S., 171 Fed. 2d. 374 ..101, 102, 103

STATUTES AND COURT RULES.

Admiralty Extension Act, 46 U. S. C. 740 98
Federal Rules of Civil Procedure, Rule 17 (a) 89
Federal Tort Claims Act (The Amended Act) 28 U. S. C. Sec. 2401 (b) 2, 87
Florida Statutes Annotated:
Sec. 320.54 ..... 75, 87
Sec. 341.24 ..... 74, 75, 87

ENCYCLOPEDIA AND TEXT BOOKS.

	PAGE
38 Am. Jur. (Negligence) Sec. 29, p. 673	65
39 Am. Jur. (Parties) Sec. 111, p. 984	96
49 Am. Jur. (States, Territories and Dependencies) Sec. 80, p. 292-295	74
50 Am. Jur. (Statutes) Sec. 389, p. 410	77
45 C. J. 689	64
59 C. J. (Sec. 458) p. 299	74
59 C. J. (Sec. 571) p. 961	77
65 C. J. S. (Negligence) Sec. 1, p. 313	64
Knight's Modern Seamanship (11th Ed.) pp. 227, 740	16
Moore's Federal Practice (Second Ed.) Vol. 3, p. 1348	91, 96
Moore's Federal Practice (Second Ed.) Vol. 3, p. 2103	93
Moore's Federal Practice (Second Ed.) Vol. 3, p. 1344	96
Moore's Federal Practice (Second Ed.) Vo.l 3, p. 1349	96, 100
Words and Phrases, Vol. 2, p. 234	75

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On Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit.

BRIEF FOR RESPONDENTS IN OPPOSITION.

OPINIONS BELOW.

District Judge DeVane, Northern District of Florida, wrote an opinion settling the pleadings. 78 F. Supp. 278.

The trial Judge (Circuit Judge Waller) wrote an opinion containing the "Findings of Fact" and "Conclusions of Law". 85 F. Supp. 489.

The Fifth Circuit of Appeals affirmed the lower Court and rendered an opinion (R. 1311) reported in 189 F. (2d) 591.

The statutes involved, as set forth by Petitioner, omit the amendment to the Federal Tort Claims Act, 28 U. S. C. 2401(b), which became effective on April 25th, 1949, prior to the trial of this case, as follows:

> "A tort claim against the United States shall be forever barred unless action is begun within two years after such claim accrues or within one year after date of enactment of this amendatory sentence *whichever is later* . . .". (Italics by counsel.)

STATEMENT.

The statement of facts contained in the Petition is incomplete and by reason of its brevity does not sufficiently set forth the principal parts of the Respondents' (hereinafter called Plaintiffs) case and a full and complete statement of the facts is essential, in considering the first question presented by Petitioner (hereinafter sometimes called Defendant). This is not a controversy which will warrant the issuance of a Certiorari under any or all of sub paragraphs U. S. Supreme Court Rule 38-5. This deficiency, as it applies to each question, will be noted under the argument upon each question.

QUESTIONS PRESENTED.

1. WHETHER THE COURTS BELOW, IN DETERMINING THAT THERE WAS NEGLIGENCE ON THE PART OF GOVERNMENT EMPLOYEES UNDER THE FEDERAL TORT CLAIMS ACT, IMPOSED ON THE GOVERNMENT AN ERRONEOUS STANDARD OF MORE THAN DUE AND REASONABLE CARE.

2. WHETHER, IN AN ACTION UNDER THE FEDERAL TORT CLAIMS ACT PREDICATED ON NEGLIGENT DAMAGE TO A STATE BRIDGE, THE RESPONDENT MAY, IN ADDITION TO THE COST OF REPAIRS TO THE BRIDGE, ALSO RECOVER DETOURS AROUND THE DAMAGED SECTIONS OF THE BRIDGE WHILE IT WAS BEING REPAIRED.

3. WHETHER THE FAILURE OF AN INSURER-PARTIAL SUBROGEE, HAVING A CLAIM AGAINST THE UNITED STATES UNDER THE FEDERAL TORT CLAIMS ACT, TO INSTITUTE SUIT OR JOIN IN AN EXISTING SUIT BY THE INSURED WITHIN THE STATUTORY PERIOD OF LIMITATIONS BARS THE CLAIM TO THE EXTENT OF THE SUBROGEE'S INTEREST.

ARGUMENT.

FIRST QUESTION.

WHETHER THE COURTS BELOW, IN DETEHMINING THAT THERE WAS NEGLIGENCE ON THE PART OF GOVERNMENT EMPLOYEES UNDER THE FEDERAL TORT CLAIMS ACT, IMPOSED ON THE GOVERNMENT AN ERRONEOUS STANDARD OF MORE THAN DUE AND REASONABLE CARE.

This case was presented to a Judge, without the intervention of a jury, and the facts as found to exist by such Judge are not in dispute, therefore, the only question to be considered is whether the plaintiffs, under the facts as the trial judge found them to exist, are entitled to a judgment in their favor.

The trial judge properly applied the law to the facts that he found to exist and the petitioner has selected isolated portions of the opinion of the court in an effort to reverse the case. When the "Conclusions of Law" are read in connection with the facts, which the court found to exist, there is no doubt as to the correctness of the decision and, in fact, no other decision was possible.

The Circuit Court of Appeals, in affirming the decision (R. 1314), 189 F. (2d) 591, text, said:

> "The first specifications of error of the appellant assumes, we think, the application by the trial Judge of a standard of care which is not supported when the Findings of Fact and Conclusions of Law are considered as a whole. The specification is predicated

upon isolated statements appearing in the Court's discussions. We are convinced from a consideration of the opinion of the Court as a whole that the judgment against the defendant-appellant resulted from no misapplication of law to the facts found by the Court. While some language of the Court may be such as to give grounds for argument upon appeal, we think that consideration of the determination of the Court as a whole demonstrates that such argument is not valid and should be rejected."

This case actually involves four separate cases, as it results from the collisions of four ships with a bridge during a squall. No attack was made in the Circuit Court of Appeals upon the correctness of the findings of fact and none is made here. Therefore, it is believed that the shortest and most appropriate method of stating the case will be to set forth almost in full, the "Findings of Fact" by the trial judge for in no other way can it be determined whether under the law such facts justified or required a verdict and judgment for the plaintiff.

Points to be Argued under Question One.

1. The facts are not in dispute, and the only question to be considered is whether under the facts the plaintiffs are entitled to a judgment as the trial judge found that the Masters had adequate warning of impending bad weather and failed to take the precautions required under established principles of good seamanship.

2. The collision of a ship with a bridge creates a presumption of fault on the part of the moving vessel.

3. The doctrine of *Res Ipsa Loquitur* is recognized by the Florida law and should be applied in a case where ships collide with a bridge.

4. That the negligence of the Masters and crew, based upon the existing facts, resulted in the damage to the plaintiffs.

5. The Court found that the defendant had failed to sustain by evidence, its burden of proof with respect to the affirmative defenses of *vis major* and inevitable accident and, therefore, a judgment could only be rendered for the plaintiff.

The plaintiffs, in opening the case, introduced as plaintiffs' Exhibit 3 (R. 127), a stipulation between the parties of undisputed facts, to the effect that, on the morning of May 20, 1946, the following steamship, S. S. "JOSIAH SNELLING", S. S. "WALTER RALEIGH", S. S. "LAYMAN ABBOTT", and S. S. "HENRY BLOOD", owned by the defendant and manned by officers and crews employed by the United States, collided with the Thomas A. Johnson Bridge, or Pensacola Bay Bridge, at certain designated locations and that at each location a certain stated amount of damage (stated in dollars) had been done to the bridge. It was further stipulated that temporary detour bridges built around the damaged portions of the bridge cost a stated amount.

After the introduction of this stipulation the plaintiffs were entitled to a verdict and judgment [1] unless the defendant could establish by evidence that it had not been guilty of negligence and that the collisions had occurred notwithstanding the fact that the officers and crews of said ships had exercised proper foresight, caution and had displayed proper nautical skill required under the existing conditions.[2]

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[1] The trial judge, in his "Conclusions of Law", said (R. 182; 85 Fed. Supp. 500):

"The fact that one hits and damages an immovable object with a movable one demands that the operator of the movable object be required to exculpate himself. The bridge did not hit the ships and the doctrine of res ipsa loquitur is applicable in this case and will serve to supply *an inference* of the lack of due care in the absence of explanation by Defendant. See Orme v. Burr, 25 So. 2d 870, 157 Fla. 378."

The Court further said (R. 183; 85 Fed. Supp. 500):

"The maxim of the common law that one must use his own property so as not to injure that of another—sic utere tuo ut alienum non laedas—is particularly applicable here and when property having mobility, belonging to one person, runs into immobile property of another, there arises a strong inference of the failure to use due care on the part of the owner of the property possessing the power of locomotion. See Eagle Oil Transport Company, Ltd. v. Bowers Southern Dredging Company, 255 F. 52 (5th C. C. A.) wherein our Court of Appeals said:

" 'The collision in question being one between a moving vessel and an anchored pipe line, the location of which was known, there is a presumption of fault on the part of the moving vessel. (Citing cases.)' "

[2] The collision of a ship with another ship which is anchored, or with a fixed object such as a bridge, creates a presumption of fault on the part of the moving vessel.

S. C. Highway Dept. vs. U. S., 78 Fed. Supp. 598, (Aff.) 171 Fed. 2d 893.

The Vulcan, 60 Fed. Supp. 158 (DC La.).

The Virginia Ehrman and the Agnese, 24 L. Ed. 890, 97 U. S. 309 (text 315).

The Dean Richmond, 107 Fed. 101, 47 CCA 138 (affirming 103 Fed. 700).

The Havana, 89 Fed. 2d 23.

Carr vs. Hermosa Amusement Corp. (CCA 9th Circuit, 137 Fed. 2d 983).

The Chickie, 54 Fed. Supp. 17.

Chico Bridge Co. v. Sacramento Transportation Co., 123 Cal. 178, 55 Pac. 780.

Penn R. Co. v. Ropner, 105 Fed. 397.

In the case of "The Blackheath" (DC, SD, Ala.) 154 Fed. 758 (text 759), the Court said:

"A vessel in motion is required to keep out of the way of a vessel at anchor, if the latter is without fault, unless it appears that the collision was the result of inevitable accident; the rule being that the vessel in motion must exonerate herself from

The doctrine of *Res Ipsa Loquitur* is recognized and applied by the Courts of Florida and where an instrumentality is shown to be under management of the defendant or its servants, and the accident is such as in the ordinary course of things does not happen if those who have the management use proper care, it affords reasonable evidence under *"res ipsa loquitur"* doctrine in the absence of explanation by the defendant, that the accident arose from want of due care.[3]

The plaintiffs, notwithstanding the establishment of a *prima facie* case, proceeded to further fortify their case and introduced evidence of specific acts of negligence on the part of masters and crews of the vessels involved in the accident.

In order to reduce the length of this brief, the continuity of the numbered paragraphs of the Findings of

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blame by showing that it was not in her power to prevent the collision by adopting any practical precautions . . . (Citing cases). The one ship ought to be able to get out of the way of the other ship if she sees her: and the other is a helpless thing, which cannot do anything. *This rule must apply with greater force to a stationary object fixed to the land in the bottom of the water, as in the case of the beacon in question.* . . ."

[3] Orme vs. Burr, 157 Fla. 378, 25 So. (2d) 870: Skinner vs. Ochiltree, 5 So. (2d) 605, 148 Fla. 705, txt. 712; Sands Springs Park vs. Schraeder, 82 Okla. 244, 198 Pac. 983, 22 A. L. R. 593.

In the case of Coaster Amusement Co. vs. Smith, 141 Fla. 845, 194 So. 336, the Court (quoting with approval from the case of Feldman vs. Chicago RRs. Co., et al., 289, Ill. 25, 124 N. E. 334, 338, 6 A. L. R. 1291, txt. 337, said:

"The rule is that negligence is never presumed, but the circumstances surrounding the case where the maxim of res ipsa loquitur applies, amount to evidence from which the facts of negligence may be found; that is in a case within the maxim of res ipsa loquitur, proof of the circumstances of such case and of the injury constitutes a prima facie case of negligence, and will justify a verdict unless such prima facie case is overcome by proof showing that the party charged is not at fault . . . (Citing cases). The burden rested upon defendants in error to overcome the presumption of negligence arising from the circumstances of this case. . . ."

Fact of the trial judge have in certain instances been rearranged and certain paragraphs of the Findings not essential to the decision have been eliminated but the manner in which the Findings are presented in this brief in no way changes the meaning or sense thereof. The pertinent Findings of Fact are as follows (R. 159, 85 F. Sup. 491):

> "The following uncontroverted facts are hereby found:
>
> "1. There were approximately forty ships in the Pensacola Harbor on the night of May 19-20, 1946, of which twenty-one were liberty ships anchored in the harbor rather than moored to the docks.
>
> "2. That these liberty ships were all light, or, that is, without cargo or ballast, rendering them much more difficult to handle in a high wind than if they had been loaded.
>
> "3. That a liberty ship is approximately 450 feet long and, when light, a large freeboard surface is exposable to the wind with a correspondingly small surface beneath the water line, with the result that some of the rudder and some of the propeller are out of the water and not fully efficient for steering, navigating, or maneuvering.
>
> "4. That Pensacola Harbor is a large, deep, landlocked harbor, lying between the mainland on the north and west and Santa Rosa Island on the south, and because of its location and bottom of deep, soft mud, into which ship anchors sink deeply and usually hold firmly, the harbor is regarded as exceptionally safe to the anchorage of vessels.

"5. Traversing Pensacola Bay and bounding the harbor on its eastern side is the Thomas A. Johnson Bridge, a concrete structure, which is part of an arterial highway in the State road system, being a link in State Roads Nos. 1 and 53 (U. S. No. 98).

"6. That the bridge was the property of Escambia County, Florida, but was under lease to the Road Department of the State, by the terms of which the Road Department was obligated to keep the bridge in operation and in repair, without expense to the County, in consequence of which the cost of repairs to the bridge fell on the State Road Department, rendering it entitled to any sums recoverable for any damages negligently caused to such bridge.

"7. That on the night of May 19-20, 1946, a severe rain and wind squall occurred in the Pensacola Harbor with the result that the above named liberty ships, together with the S. S. "Harold T. Andrews", dragged anchor and collided with the highway bridge, causing minor damages at one point but substantial damages at three other places. For convenience the points on the bridge at which the ships struck will be designated as Points 1, 2, 3, and 4.

"8. Omitted. (It deals exclusively with the stipulations as to damages.)

"9. Each of the liberty ships was brought into the harbor by Pensacola Harbor Pilots, by whom anchoring berths were assigned and the Master of each vessel was advised as to the type of holding ground in the harbor and that one anchor, with three shackles of anchor chain in the water, was sufficient to hold the

ship in ordinary weather. Each vessel was so anchored as to permit the vessel to swing completely around without striking any other vessel anchored in the harbor; that is to say, that each ship of 450 feet in length and having three shackles, or 270 feet, of anchor chain in the water, totalling 720 feet, must have considerably more than twice that distance between it and any other ship having the same length and number of shackles in the water in order to allow the paying out of additional chain in rough weather and so that such ships would not come into collision in the event both of such ships should swing simultaneously in opposite directions."

The Court further found:

"17. It is generally conceded, and I find, that proper seamanship requires that a watch of not less than a licensed deck officer, an A. B. seaman, a fireman, and a licensed engineer, be maintained at all times when a ship is anchored in a harbor, and steam is to be kept up, as was the case here."

"10. That the weather forecast by the Weather Bureau of the Department of Commerce for Sunday, May 19, 1946, was:

"'Cloudy, with showers and thunderstorms tonight and Monday. Moderate southerly winds. Special wind warning, none.'

"No storm warnings of any character were given by the flying of pennants, or otherwise, during the day or night of May 19."

At this point, counsel desires to call to the attention of the Court that the above forecast did not indicate that the maximum winds which could be expected in the thunderstorm would be "moderate" winds or winds from 13 to 18 miles an hour. (See Beaufort's Scale, R. 477.) The weather bureau makes no effort to forecast the velocity of winds in thunderstorms,[4] there being no way known to science whereby such winds can be predicted.[5] The best method of determining the approach and characteristics of a thunderstorm is by visual observation.[6] All masters of vessels are required to be capable of making weather observations and are examined upon the subject before they are granted a license.[7] All of the ship's masters (expert witnesses for both plaintiff and defendant) knew that forecasts did not attempt to predict the intensity of wind in a thunderstorm for the velocity of such wind may be only 10 miles an hour or it may be 100 miles per hour.[8]

> "18. The following aspects of a thunderstorm have been definitely shown by substantial evidence:
>
> "(a) That a thunderstorm or squall usually covers a relatively small area and the Weather Bureau does not undertake to chart the time of occurrence, the course, or the intensity of such local phenomina.
>
> "(b) That a thunderstorm is often accompanied by high winds but it is impossible to forecast or to tell the strength of the wind that will strike at

[4] Stoessen, Weather Bureau, Pensacola, Def.'s witness, R. 1200, 1202.
[5] Hall, Meteorologist, R. 359, 360. Stoessen, Weather Bureau, R. 1200.
[6] Adm. Rosasco, R. 371. Capt. Borden, R. 417-418, 427. Capt. Roupe, R. 1325.
[7] Adm. Rosasco, R. 371. Capt. Stapleton, R. 391. Capt. Borden, R. 410.
[8] Adm. Rosasco, R. 377-378. Capt. Stapleton, R. 394. Capt. Borden, R. 414, 428. Capt. Hightower, R. 1302. Capt. Kettler, R. 809. Capt. Dalton, R. 1264.

any given point at any appreciable time before it strikes, although there are many signs to one experienced in observing thunderstorms and squalls that are sufficient to indicate their approach and something of their character and to suggest the taking of appropriate precautionary measures by mariners in preparation therefor.

"(c) That a licensed deck officer of a vessel should be weather conscious and conversant with weather conditions that might affect the safety of his, or other vessels, or installations in close proximity.

"(d) That a definite shifting of the wind, a noticeable increase in the velocity of the wind coming from an area where there is vivid lightning, a lowering of heavy clouds that overcast the sky, low, fast-flying scud clouds approaching in direction of the vessel, are generally recognized by mariners as indicative that a *squall or thunderstorm is in the marking out of which dangerous winds may come*." (Italics by counsel.)

The Court further found (R. 166, 85 F. Sup. 493):

"from a preponderance of the credible evidence, the following facts:

"1. That clouds began to gather in the southwest, together, with occasional flashes of lighting, around 10:30 o'clock and before midnight the sky had become overcast the clouds thicker,[9] the lightning

Notes by Counsel:

[9] 9:30 P. M "Ceiling estimated at 10,000 feet." (NAS record (R. 151). 11:30 P. M. ". . . Ceiling indefinite around 1700 feet." (NAS record). "Sky: low overcast and lower broken clouds." (R. 152) . . . "Scud clouds present with bases at 500 feet."
12:30 A. M. "Ceiling 1000 feet estimated." "Sky low overcast and lower broken clouds." (NAS record) (R. 153).

more frequent,[10] indicating that thunderstorm or squall of some character was making up in the southwest. There was some increase in the wind as the night wore on and a shifting of the winds from southeast to southwest.[11] By 12:30 that night the overcast clouds had lowered and low, fast-flying scud clouds [12] were discrenible, and weather-conscious persons, having the knowledge that a licensed deck officer has, or ought to have, of thunderstorms and squalls, should have been able to anticipate that a thunderstorm or squall was approaching, and that wind of some velocity was apt or likely to occur.[13]

Notes by Counsel:

[10] 11:30 P. M. "Lightning visible to west." (NAS record) (R. 152).
12:30 A. M. "Frequent lightning visible to northwest." (NAS record) (R. 153).
1:00 A. M. "Vivid lightning cloud to cloud." (Municipal airport record) (R. 148).
1.30 A. M. "Lightning all quadrants (directions)." (NAS record) (R. 154).

[11] 9:30 P. M. "Wind: South southeast ten miles per hour." (NAS record) (R. 151).
11:30 P. M. "Wind: South, fourteen miles per hour." (NAS record) (R. 152).
12:30 A. M. "Wind: South southwest eighteen miles per hour." (NAS record) (R. 153).

[12] 11:30 P. M. . . . "Scud clouds present with bases at 500 feet (NAS record) (R. 152).
"Weather Glossary U. S. Dept. of Commerce, defines scud (R. 342): 'Low ragged detached fragments of clouds with elevations from 100 to 300 feet, usually associated with nimbostratus and a stormy sky'."
"Twentieth Century Unabridged Dictionary, page 1493, defines scud: 'Loose vapory clouds driven swiftly by the wind'." (R. 344.)
Mr. Stoessen testified that with a shift of wind as much as 35 degrees from the Southeast to the Southwest, heavy clouds and lightning present, would be indicative that there was some wind in an approaching storm (R. 1202) and if there is scud or low, fast flying clouds present it would be indicative of high surface winds if there is a storm cloud in the area. (R. 342.)
Prof. Hall testified to substantially the same (R. 342).

[13] All of Ptf.'s experts stated and the following def.'s experts admitted, that the conditions were such as to require alert watch with respect to the weather.
Capt. Roupe, (R. 1237):
"Q. So that if a thunderstorm has been making up for two hours and you were in command of a light ship in the congested harbor, do you not think that good seamanship would require you to observe that storm carefully . . . from time to time?
"A. I would say yes."
Capt. Kettler, (R. 818):
"Q. Now, Captain, is it good seamanship, that if you see a squall making up, the intensity of which you cannot determine,

In view of the unsettled condition of the weather and the progressive indications of approaching bad weather, what were the requirements of good seamanship?

The Court found these requirements based upon a preponderance of the credible evidence (R. 170, 85 F. Sup. 495), as follows:

> "3. . . . All of the officers interrogated on the subject agreed that there are three general methods of determining whether a ship is dragging anchor, namely: (a) by feeling the anchor chain to see whether it was quivering as is usual when the anchor drags along the bottom; (b) by taking bearings on, or visualizing, stationary objects; (c) by dropping a leaded line overboard to the bottom. There is divergence of thought as to the efficacy of the last method. It was also generally recognized by all of the experienced mariners who testified that: (1) It is much easier to prevent a ship from dragging anchor in a storm by taking precautions before the anchor is broken out and the ship has begun to drag than to fetch up the ship after it has begun to drag. (2) In case of light ships at anchorage, in a storm such as the one in Pensacola Harbor that night, it is generally deemed necessary to: (a) Maintain an alert deck watch composed of at least a licensed deck officer and an A. B. seaman and also an engine crew composed of a licensed engineer and a fireman; (b) order steam on the main engine; (c) pay out additional anchor chain; (d) drop an additional anchor; and (e) by the use of steam head up and keep the vessel's bow into

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that you should be alert until the squall or thunderstorm passes over, is that correct?

"A. That is correct, but a ship should keep an alert watch all the time, whether there is any squall or not."

the wind. In the latter operation the evidence shows that it is easier in a congested harbor to head a light ship into the wind with the anchors out than with the anchors up".[14]

The Court found that the shifting and increase of wind, and overcast sky, fast-flying scud clouds and vivid lightning, are warnings which mariners recognize as generally indicating that a squall or thunderstorm is in the making, out of which dangerous winds may come, (R. 165),[15]

Note by Counsel:

[14] "Knight's Modern Seamanship" (11th Ed.), states as follows:
(Page 740, R. 360):
"Thunder storms are essentially intense local storms associated with the cumulonimbus clouds, and are characterized by squalls, gustiness, turbulence, showers, thunder and lightning, and often hail. . . ."
"The strong and gusty surface winds are of serious concern to surface craft. . . ."
(Page 227) (R. 383):
"When the conditions are such that there is a possibility of starting the anchor, a lookout should be kept which will insure instant notice if she begins to drag."
(Page 227) (R. 382):
"In lying at an anchorage where such situation may arise, the greatest watchfulness should be exercised, steam being kept on the steering engine, and a man at the wheel, an ample scope of chain veered, and a second anchor ready for letting to at a moment's notice. The last-named precaution should in fact be always taken; that is to say, a second anchor should always be ready, even though there seems no chance of its being needed."

[15] In the case of *South Carolina Highway Dept. vs. U. S.*, 78 Fed. Supp. 598, where a ship dragged anchor and collided with a bridge, (Text 606), the Court said:
"Giving due consideration to all of the differences and discrepancies in the testimony, considering the interest, considering the status of the different witnesses in their business, motives, interests and distinterests, I am constrained to believe that while there were no direct reports of a large storm brewing or approaching, there were very many indications that rain and wind probably of a temporary and perhaps of a serious character were to be expected. Many careful observers expected bad weather. . . . They, of course, did not know that a serious storm would hit the locality but they were prudent enough, in view of the weather that they saw, to feel that there was a strong probability, and danger, of a bad storm. And if those in charge of the Nicaragua Victory had had the same prudent foresight, and had exercised ordinary prudence, this catastrophe would never have happened."
The Court further said: (Text. 606.)
"There was ample warning that some weather disturbance might be expected. It is probable that if the regular officers

and the failure of the masters to take the precautions

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had been in charge and on duty, they would have issued orders to the crew to drop an additional anchor or at least have placed men to stand by to drop the anchor and have the engine room alerted. This was not done."

When the facts in the above case are examined, it will be seen that virtually all of the acts of negligence which were present in such case, are present in the case at bar.

In the case of *Clyde S. S. Co. v. U. S.*, 27 Fed. 2d 727, (2 CCA), text, the Court, said:

"Under the weather conditions that existed this night, a master, anchoring in such crowded waters was in duty bound to exercise reasonable precautions to prevent every possible disaster . . .".

In the case of *The Djerissa*, 258 Fed. 949, the following facts were before the Court (text 950):

". . . Evidence of an approaching storm was apparent as early as 6 P. M. and the weather, accompanied by thunder and lightning, was threatening for two hours prior to the collision, although the wind did not reach high velocity until immediately preceding it. The Weather Bureau at Norfolk shows that from 8:59 to 9:09, the wind blew from the southwest 18 miles an hour; from 9:09 to 9:15 at 20; at 9:27 it dropped to 19; that at 9:27 to 9:29 it increased to 44 miles; from 9:29 to 9:30 to 68 miles; at 9:37 it dropped to 60 miles; at 9:38 to 58 miles; at 9:39 to 48 miles; at 9:41 to 35 miles; and gradually declined until 9:59 when it dropped to 15 miles. Doubtless the velocity out in the harbor of Newport News was something higher than shown by these figures; one witness described it at its height, for short periods, at 75 miles an hour."

The Court further said:

". . . The storm was an unusually violent one for a while, and it is true that several other vesssl in the harbor dragged their anchors. But it by no means follows that, had Newa's navigators exercised the nautical skill reasonably to be expected of them, having regard to the admonition of the impending weather conditions, by paying out more chain on her starboard anchor, or by earlier dropping her port anchor, they probably would have entirely avoided danger, such as was encountered."

In the case of *Carl Konow*, 64 Fed. 815, the Court said:

"The danger was apparent for hours previously; the approach of the storm was plainly visible, and should have been provided for. . . ."

In the case of *The Barge*, 250 Fed. 467, a steamer was anchored on the previous evening and a barge came in about 2 A. M. and anchored about a thousand feet from the steamer. The Court said:

"The wind was then fresh from the northwest; it soon increased to a moderate gale, and by half past two had reached full gale force, 55 or 60 miles an hour . . . The steamer was light; she rode high out of the water and was much affected by the wind. . . ."

". . . Weather conditions were something the Llamberis (steamship) was bound to notice and take proper precautions against. The possibility that, if the wind should increase, she might drag a single anchor was evident. . . . Other vessels were anchored in her vicinity, so placed that danger both to herself and to them might result, if she dragged any considerable distance. . . ."

The trial Judge in the conclusions of law and fact cited the cases of *The Drumcraig*, 133 Fed. 804 and *The Terje Vikens (The*

which good seamanship required, was negligence.[16]

The Court further found (R. 166, 85 F. Sup. 494):

> "2. Between 1 A. M. and 1:25 A. M., the wind had increased in gusts to 35 knots per hour and between 1:25 A. M. and 1:40 A. M., it had increased in gusts to 52 knots at the U. S. Naval Air Station . . . Southwest of the Harbor and directly in the path from which the storm came. The 52 knot gusts lasted ½ minute. . . . The evidence convinces me that the wind gusts in the harbor . . . reached intermittent velocities of 40 to 75 miles an hour for approximately 15 minutes. . . . No damage was done to wharves, docks or property on the shores in Pensacola or on Santa Rosa Island. . . . I have given much consideration to the fact that the gusts of wind were of sufficient strength and duration to cause at least fourteen of the liberty ships to break out of the good holding ground . . . and to drag anchors . . .".
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> * * * *

Bavaria) 212 Fed. 1020. In the first mentioned case, the Court said:

"... the storm, although a violent one, gave sufficient warning of its approach to have made it the duty of the master of the Lochtrool to put out more fastening lines before the ship broke from her moorings. . . ."

[16] In the case of *"The Blackheath"*, 154 Fed. 758, Text 760, the Court said:

"Conceding that he knew the existing conditions, and what were the proper things to be done, as shown by the evidence, he should have governed himself accordingly, and acted with greater promptness in the execution of those things. The evidence, in my opinion, shows a clear error of judgment, if not a want of proper skill, or inattention to his duty and to consequences on the part of the pilot. 'The China', 7 Wall. 53, 19 L. Ed. 67."

In the case of *The Terje Vikens (The Bavaria)*, 212 Fed. 1020, the Court said:

"... but because of omissions on the part of the steamship to properly and timely perform her duty, as well in the manner of her original anchorage as *her neglect to take extra precautions in the face of the impending storm*, especially as it was apparent that her then anchorage was insufficient . . . as the cause of the collision and negligence on the part of the steamship." (Italics by counsel.)

"3. . . . The squall was accompanied with a hard, blinding rain which practically destroyed visibility and any opportunity for the deck watch to judge from shore installations, lights, or bearings, whether or not the ship was dragging anchor."

The Court, after making its Findings of Fact, proceeded to state the plaintiff's theory of the case and the defendant's theory of the case. The brief filed in the Circuit Court of Appeals specifically cited record references where each element of the case of the plaintiff was supported by credible evidence.

The Court said (R. 171, 85 F. Sup. 496):

The Plaintiff's Case Against S. S. Josiah Snelling.

"1. That the ship had only the port anchor in good working condition. The fulcrum on the windlass of the starboard anchor was broken either on April 28 or May 11, with the result that although the vessel could have dropped the starboard anchor, it could not have been raised without outside assistance. The machine shop on shore repaired this broken fulcrum in five days, and if the master had sent it to the shop promptly after its disablement it would have been repaired and ready for use before the storm on the 19th and 20th. He did not send the fulcrum to the shop until the 17th of May, and it was not returned to the ship until either the 21st or 22nd of May. Without the use of starboard anchor the ship was not seaworthy but was a menace to the other vessels or installations in the harbor. That the master knew of the defective condition of the fulcrum, the crowded conditions in the harbor, the difficulty of

handling an unloaded ship, the proximity of the ship to the bridge, and should have made himself acquainted with the conditions of the weather.

"2. That the mate saw bad weather making up but was unimpressed.

"3. That the ship's officers were negligent in view of all the circumstances, in the absence of one of the anchors, and in view of the threatening weather, in not maintaining steam on the main engine in order to aid the one anchor in the event a blow should develop.

"4. That the captain, instead of paying out more chain on the port anchor, pulled in anchor and failed to utilize sufficiently the steam when same was gotten up and turned onto the main engine.

"5. That the A. B. seaman of the deck watch was asleep and was not called until about the time the ship struck the bridge.

"6. No steps were taken in advance of the squall to prevent the ship from dragging anchor and inadequate steps were taken to stop it from dragging after it was discovered the ship was dragging anchor."

The Plaintiff's Case Against S. S. Walter Raleigh.

"1. One of the mates, who was the deck officer on watch, saw that the weather was threatening on the night of the storm. A deck watchman, who was not an A. B. seaman, or a part of the crew, also observed the threatening weather. Nevertheless, the

mate went to bed at 12:30. He had been on duty continuously as deck watch officer since May 8, in violation of Sec. 235, Title 46, U. S. C. A.[5]

"2. That there was no A. B. seaman on board or on deck watch.

"3. That the starboard anchor was up and secured by a devil's claw in the manner that it is secured out at sea and could not be dropped without first removing the devil's claw. (The testimony is at variance as to the time required for removing the devil's claw and no definite time can be fixed since it appears that the time consumed would depend largely upon the condition of the equipment; that is, as to whether or not the turn buckle was rusty or otherwise, and whether or not a bar was necessary to loosen it.)

"4. That the master of the vessel came on board, between midnight and the time that the storm hit, in a drunken or stupid condition.

"5. That he discovered the ship was dragging anchor at 1:15 but did not drop the starboard anchor until 1:30.

"6. That although he ordered steam up on the main engine, he failed to use same for some fifteen minutes after the engines were made ready.

"7. That the mate suggested that the starboard anchor be dropped at 1:15 but the master refused to accept the suggestion.

Notes by Court:

[5] "The pertinent portion of Sec. 235, Title 46 U. S. C. A., is as follows: '235. Watch duty of deck officers * * * and no licensed officers on any ocean or coastwise vessel shall be required to do duty to exceed nine hours of any twenty-four while in port, * * *'."

"8. That his ship, according to its log of May 7, had dragged anchor on that date.

"9. That he failed to drop the starboard anchor until his ship was practically in contact with the bridge.

The Plaintiffs' Case Against S. S. Henry H. Blood.

"1. The captain was the deck officer on watch on the night of the storm.

"2. The chief mate, who woke up after the storm began, ran forward and dropped the starboard anchor. He also paid out chain until he felt the ship swing and knew the anchors were holding.

"3. The log of the vessel shows that the storm struck at about 1:30 and that by 1:45 the stern of the vessel was near the bridge, or, that is, close enough for the mate to see the bridge.

"4. It does not appear that there was any A. B. seaman on watch or that the captain who was said to be on watch was alert to the situation. If so, an experienced mariner should have realized that the wind was of sufficient force that it was likely to cause the ship to drag anchor and should have dropped the anchor before waiting to see if it was dragging, or would drag, anchor.[6]

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[6] "The Blood was struck by the S. S. Lyman Abbott and perhaps would not have collided with the bridge had this collision not occurred. The greatest damage done to the bridge at this point apparently was caused by the S. S. Lyman Abbott.

"It is significant that the dropping of the starboard anchor and the paying out of additional chain by the mate was effective in making the ship fetch up and cease to drag, even though the ship had been allowed to drag anchor before the second anchor was used.

"In the case of this vessel, as well as the others that ran into the bridge, there was a failure to use the engines until the ship had drifted too close to the bridge for the use thereof without danger of injuring the propeller."

The Plaintiff's Case Against S. S. Lyman Abbott.

"1. That the deck log and engine room log do not agree in that the engine room log shows that the mate ordered the main engine made ready at 1:45, while the deck log states that the order was given at 1:36.

"2. The master was given warning of the approach of the storm by the third assistant engineer, Anderson. The mate was given warning of the approach of the storm by the third assistant engineer, Anderson, and also by Hall, an engine room wiper. That the mate refused to accede to Anderson's request to take a look at the weather but informed the wiper that he did not need any advice from the engine room.

"3. Since steam was on the main engine at 1:45 and the S. S. Abbott did not strike the S. S. Blood until 1:55, ten minutes elapsed in which use might have been made of steam on the main engine if the deck log is correct.

"4. That neither the master nor the mate was alert but entirely indifferent to weather conditions.

"5. That the mate failed to drop anchor and to pay out chain in time to prevent the collision which could have been done had the deck watch paid attention to the weather or attention to the warnings of witnesses, Anderson and Hall"[7]

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7 "There is testimony by witness Hall that he never heard or felt the starboard anchor drop. There is testimony of other witnesses that they heard the anchor being dropped after the Abbott had struck the Blood and about the time that it struck the bridge. Much of the testimony in regard to what happened is contradictory, including the vessel's logs. . . ."

An examination of the "Further Findings of Facts" (R.186 and 187) will disclose that the court specifically adjudged that each of the ships had been guilty of one or more acts of negligence based upon the facts found to exist.

The Court then discussed the defendant's position and the testimony which it introduced, these statements appearing on pages 177 to 179 are not "Findings of Fact" but merely constitute a discussion of the defendant's testimony.

"Defendant's Position.

"The defendant has denied the charges of negligence and has set up, and relies mainly upon, two defenses, namely, (1) inevitable accident and (2) act of God. It has treated these two defenses largely as if they were synonymous for it says that the suddenness and fierceness of the squall was an act of God for which it was in no wise responsible and could in no event have prevented, and in the face of which the masters and officers of its ships exercised all reasonable care and caution, and the collision with the bridge were inevitable and unavoidable.

"The two defenses are not always synonoymous. Although an act of God might cause an inevitable accident, nevertheless inevitable accidents are not all caused by acts of God, but in this case the defendant's contention is merely that because of an act of God the accident was inevitable.

"The defense has shown by numerous experienced and expert mariners and men of the sea that good seamanship does not require extraordinary precautionary

steps every time the clouds gather or the lightning flashes and the thunder rolls; that thunderstorms and squalls, such as it insists this one appeared to be until it struck, were nothing to excite apprehension, or to demand the taking of unusual precautions. The masters and officers of the ships assert that they exercised reasonable care and caution and that there was nothing either in the heavens or on earth to indicate the ferocity and suddenness with which the squall struck. They insist that they were suddenly thrust into an emergency and thereupon used such care and caution in the emergency as a reasonably prudent person would and should have used, and that their acts or omissions in the premises must be judged by what a reasonably prudent person would have done when thrust into so quick and so great an emergency. To that end these mariners have shown that the weather conditions were not such as to give reasonable grounds for apprehension, and that when the storm struck with suddenness and fury, and they found their ships were dragging anchor, they paid out more chain, or cast out another anchor, and ordered steam on the main engine, and did those things which a reasonably prudent and experienced mariner would have done in the circumstances, and which their judgment dictated were the appropriate and wise things to do. *None of them, however, has said that the wind was of such velocity that the ships could not have been prevented from dragging anchor*[17]

Notes by Counsel:

[17] The testimony of the mariners for both the plaintiff and defendant discloses that they were of the opinion that the paying out of more chain on the one anchor or the dropping of the second anchor, if this was accomplished before the ship had begun to drag, would have prevented the collision.

BAYS (Mate on Raleigh) testified that he believed that if the captain had followed his suggestion and dropped the second anchor

but that the suddenness and velocity of the gusts were so unexpected that the usual and customary steps taken in such situations failed to stop the ships once they had broken out anchor and had begun to drag, which, by virtue of the suddenness and unexpectedness, occurred before they, in the exercise of reasonable care and caution, could become aware that the ships were dragging. There is much evidence that establishes that the wind broke with great suddenness and violence and came in gusts that tended to jerk the anchor out of its holding ground; that because of the good holding ground and its landlocked protection it was considered an exceptionally safe harbor; that no storms had been forecast, no alarming drops of the barometer occurred; that

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and paid out additional chain, he believed the ship would have held (R. 569).

CAPT. STAPLETON (R. 403) testified that in his opinion a light liberty ship anchored in Pensacola Bay would not drag in a 52 Mi. wind if she had both of her anchors down and an adequate scope of chain (R. 404).

CAPT. BORDEN (R. 415) testified that if a liberty ship was anchored in good holding ground with two anchors out and an adequate amount of chain (75 fathoms on one anchor and 45 on the other) he did not believe that the ship would drag in a 65 Mi. wind. (R. 415-416 and a 52 Mi. wind is not unusual in squalls (R. 416).

CAPT. HIGHTOWER (R. 1304) testified that if a light ship was anchored with 6 shackles of chain on one anchor, he believed it was doubtful if she would hold but if she had another anchor out with 45 or 60 fathoms out, it would hold in a 60 Mi. wind and probably would hold in a 75 Mi. wind. (R. 1304.)

CAPT. KETTLER (expert for defendant) testified that assuming there was good holding ground and the proper weight of anchors and the second anchor was dropped before the ship begins to drag and three additional shackles were veered out on the starboard side, he believed that a ship would hold in a wind of 60 Mi. an hour (R. 820).

CAPT. BROWN, Harbormaster (Def.'s witness) (R. 1142) testified that in his opinion if the ships had had six shackles of chain out on the port anchor a ship would hold in a 60 Mi. an hour wind. (R. 1146.)

CAPT. MALOY (Def.'s witness) testified that six shackles out on one anchor would take care of most any contingency (R. 1120).

CAPT. BELL (Def.'s witness) (R. 1139) testified that in his opinion if the captains had promptly paid out two or three shackles of chain on the one anchor that was down, before the ship began to drag, that the ship would not have dragged anchor in a 65 to 75 Mi. gale (R. 1139).

thunderstorms and squalls were not unusual occurrences in the Pensacola Harbor, and that not only did the five ships drag against the bridge but that nine other liberty ships also dragged anchor and two ships tied to the docks broke their lines—from which defendant argues that the masters and officers of fifteen or sixteen vessels failed to anticipate a storm of such intensity or to take advance steps to prevent their vessels from dragging. (Italics by counsel.)

"Before concluding my discussion of the factual situation I deem it appropriate now to ascertain and to announce certain pertinent legal aspects of this case." (Italics by counsel.)

At this point the Court proceeded to state its "Conclusions of Law" and summarized certain circumstances which heretofore have been set forth, in a footnote in this brief at page 28, but in order that the Court may have before it the entire "Conclusions of Law" as the same were set forth by the District Court, it is believed that repetition is desirable. Appropriate notations will be made indicating those excerpts which have been previously quoted in this brief.

"Conclusions of Law.

"The law of averages cannot be made the criterion of liability here. The fact that fourteen dragged anchor and seven did not and that only five of the vessels collided with the bridge, are circumstances to be taken into consideration, but each tub must stand on its own bottom—each vessel must show that it exercised proper care under the circumstances, and this case will be determined by what was due care

under the circumstances. If the masters of these vessels were merely required to exercise ordinary or reasonable care *after the officers of the vessels discovered their peril,* then the Defendant would doubtless be entitled to a judgment in its favor [18] We, therefore, must determine what was the degree of caution and care which the circumstances demanded of the masters of these vessels. (Italics by counsel.)

"Let us epitomize the circumstances:

"1. A harbor filled with forty ships, twenty-one of which were liberty ships anchored in the harbor rather than moored to the dock.

"2. All twenty-one of these liberty ships were light and without cargo or ballast.

"3. All of these ships had only one anchor out and three shackles of chain in the water.

"4. All of these ships had a large portion of the rudder and some of the propeller above the water, with a consequential loss of maneuverability.

"5. It is universally known to mariners that an unloaded vessel is much more difficult to manuever or to handle in a storm than a loaded vessel.

"6. A coal tipple and several docks and shore installations projected into the deep water of the harbor.

Note by Counsel:

[18] Counsel contend that the Court held that the defendant had exercised ordinary and reasonable care—they completely ignore the phrase "after the officers discovered their peril".

"7. The highway bridge traversed the entire eastern side of the harbor.

"8. Threatening weather was on the horizon.

"The term 'safe harbor' or 'safe anchorage' at Pensacola was a relative term and by no means absolute.

"A master of these vessels should have not only sought to avoid collisions with the bridge and the docks and the vessels, but also endeavored to prevent the crossing and entanglement of its anchors with the anchors and chains of other vessels.

"The threat of an approaching storm on a loaded vessel at open sea is a matter of small moment in comparison to the threat of an approaching squall to a harbor full of light liberty vessels at anchor. In the former the master is concerned only with the safety of his vessel, its cargo, and its crew, but in the latter he must concern himself also with the danger that this vessel might cause to the lives and property of others in that area.

"It was the duty of the masters of these vessels to know and to understand their responsibility in the situation that they were in on the occasion in question. Ordinary care or reasonable care was not the test, but a very high degree of care and caution was required *under the circumstances present at the time.*[18a]

[18a] Counsel for defendant contend that this is an erroneous conclusion of law. (Italics by counsel.)

"Before going further into these conclusions it is appropriate that we give consideration to the question of the burden of proof. I think this burden is on the Defendant whenever it pleads in defense either inevitable accident or act of God. See Gleeson vs. Virginia Midland Railway Company, 140 U. S. 435, text 444; A. C. L. Ry. v. Hendry, 112 Fla. 391, 150 So. 598.

"The fact that one hits and damages an immovable object with a movable one demands that the operator of the movable object be required to excuplate himself. The bridge did not hit the ships and the doctrine of res ipsa loquitur is applicable in this case and will serve to supply an inference of the lack of due care in the absence of explanation by Defendant. See Orme v. Burr, 25 So. 2d 870, 157 Fla. 378.[19]

"Moreover, the Defendant must show that the collision occurred wholly through the act of God and entirely without fault or negligence on the part of its agents. Under the Federal Tort Claims Act we must be guided by the known and applicable principle of law of the State of Florida. We note that the Supreme Court of Florida, in Atlantic Coast Line R. Co. v. Hendry, 150 So. 598, said:

> " 'The defense of vis major may be successfully interposed in an action for damages resulting solely from an act of God; but if the defendant's negligence is a present contributing proximate cause, which, commingled with the act of God, produces the injury, then the defendant is liable notwithstanding the act of God. Davis v. Ivey, 93 Fla. 387,

[19]Previously quoted in footnote on page 7 of this brief.

112 So. 264; Case note 29 L. R. A. (NS) 663; Case Note 42 L. R. A. (NS) 709.'

" 'The burden is on the defendant who interposes the defense of vis major to show that the damages resulted solely from the act of God and that it contributed in no way thereto.'

"The Defendant has not discharged that burden in this case. It must be kept in mind that it was not the storm that knocked holes in the bridge but it was the vessels, the property of the defendant. In United States v. Bruce Dry Dock Company, 65 F. 2d 938, the Fifth Circuit, in dealing with a question of liability of a vessel of the United States for damage caused to a dry dock by one of its vessels which broke loose from its moorings during a hurricane, said:

" 'It is argued on behalf of appellant that the hurricane was the efficient cause of the damage. But appellant is not entitled to take that position in the absence of a showing that the master and crew took every reasonable precaution to prevent the damage that was done.'

"The maxim of the common law that one must use his own property so as not to injure that of another—sic utere tuo ut alienum nonlaedas—is particularly applicable here and when property having mobility, belonging to one person, runs into immobile property of another, there arises a strong inference of the failure to use due care on the part of the owner of the property possessing the power of locomotion. See Eagle Oil Tranport Company, Ltd. v. Bowers Southern Dredging Company, 225 F. 52 (5th C. C. A.) wherein our Court of Appeals said.[20]

[20] Previously quoted in footnote on page 7 of this brief.

" 'The collision in question being one between a moving vessel and an anchored pipe line, the location of which was known, there is a presumption of fault on the part of the moving vessel. (Citing cases.)'

"I hold, therefore, that the Defendant had the Burden of showing itself to be free from the commission or omission of any act proximately contributed to the injury and that if it has failed so to do the defenses of inevitable accident and vis major must fall. See: The George W. Peavey, 183 F. 571, 106 C. C. A. 117, affirming D. C. 1909, 173 F. 715; The Pennsylvania, 65 U. S. 307, 24 How. 307, 16 L. Ed. 699; The Newa, 267 F. 115, affirming D. C. 1919, the Djerissa, 258 F. 949; The Baltic, Fed. Cas. No. 823, 2 Ben. 452; Southern Ry. v. U. S. 45 Ct. Cl. 322; The David Dows, 16 F. 154; The Edmund Moran, 180 F. 700, 104 C. C. A. 552, affirmnig D. C. 1909, 173 F. 109; The Old Reliable, 269; San Pedro L. A. & S. L. R. Co. v. U. S., C. C. A., Cal., 220 F. 737, 774:

"In the Drumcraig, 133 F. 804, it is said:

" 'An inevitable accident is something that human skill and foresight could not, in the exercise of ordinary prudence, have provided against. * * * I think it is shown by a fair preponderance of the evidence that the storm, although a violent one, gave sufficient warning of its approach to have made it the duty of the master of the Loch Trool to put out more fastening lines before the ship broke from her moorings, and the failure to do this constitutes negligence for which the Loch Trool must respond in damages.' See the Terie Viken v. The Bavaria, 212 F. 1021. See also The British Isles, 264 F. 318; The Louisiana, 3 Wall. 174, 18 L. Ed. 85.

"A case very much in point is United States v. South Carolina Highway Department, 171 F. 2d 843, in that a vessel belonging to the United States was caused by a sudden squall to drag anchor and to collide with a highway bridge of the South Carolina Highway Department. As in the present case there were no storm warnings and the squall came up suddenly, having a velocity of approximately sixty miles per hour. The liberty vessel, which was light, dragged anchor, and the only thing done to prevent the collision with the bridge was the dropping of the starboard anchor shortly before collision. In that case it was shown that the night mate had gone on watch and remained on duty from the time he went on board the vessel at 5 P. M. Friday until the collision, about 4 o'clock Sunday afternoon. The District Court held (78 F. Supp. 598) that the master who had allowed this violation of the law not only 'probably did not but that it could not have' contributed to the collision. It will be recalled that Bays, the third mate on the 'Raleigh,' began his deck watch on May 8, 1946, and had been on watch continuously from May 8 until after the storm on May 20, and that notwithstanding that he was on watch he was in bed at 12:35 on the night of the storm and did not awaken until about 1:15 or after the storm had arrived. The Court in that case also held that 'Where a drifting ship collides with an object which is in no way at fault, the ship must show affirmatively that this drifting was the result of inevitable accident which human skill and precaution could not have prevented. The Louisiana, 3 Wall. 164, 70 U. S. 164, 18 L. Ed. 85'. The Newa, 4 Cir. 267 F. 115."

"This case was affirmed by the Fourth Circuit in an opinion found at 171 F. 2d 893."

"Citations could be multiplied indefinitely to the effect that one cannot plead inevitable accident or act of God if it lay within his power to have prevented the accident by the exercise of human foresight, care, and caution, but to cite more of them seems unnecessary in view of the holdings of the Supreme Court of both the State of Florida and the United States."

After the discussion of the applicable law, the Court in its "Further Findings of Fact" (R. 186) specifically pointed out ten negligent acts which justified recovery and made a finding that the defendant had not sustained its affirmative pleas. Each finding of negligence made by the Court will be printed in capital letters, followed by the citation of simliar cases supporting the Findings of the Court.

"Further Findings of Facts."

"IT WAS DEMONSTRATED THAT SIX OR SEVEN OF THE VESSELS IN THE SAME HARBOR DID PREVENT THEIR VESSELS FROM DRAGGING ANCHOR. IT WAS SHOWN THAT SIXTEEN OF THE VESSELS DID NOT COLLIDE WITH THE BRIDGE. THIS SHOWING, ALTHOUGH NOT POSITIVE PROOF, IS A STRONG ARGUMENT FOR THE INFERENCE THAT THE FOUR VESSELS COULD ALSO HAVE BEEN PREVENTED FROM CRASHING INTO THE BRIDGE BY THE EXERCISE OF DUE CARE, CAUTION, AND FORESIGHT. THE FACTS AND CIRCUMSTANCES POINTING TO FAULT ON THE PART OF THE MASTERS OF THE FOUR VESSELS WILL NOT BE AGAIN SET OUT, BUT IT SEEMS TO ME—

"THAT THE FAILURE TO HEED THE WARNINGS THAT THE VIVID LIGHTNING WROTE IN THE BOILING CLOUDS GATHERING IN THE SOUTHWEST AND TO PAY NO ATTENTION THERETO UNTIL THE VESSELS WERE ALREADY ADRIFT;" [21]

In the case of *S. C. State Highway Department, et al. vs. the United States,* 78 Fed. Supp. 598, there was no weather forecast indicating a storm but there was evidence substantially the same as that introduced in this case which indicated the approaching squall for some time before it arrived. The Court said: (Text 607.)

> ". . . And I find that the ship and its operators were negligent *in failing to observe and obey clear warnings of bad weather;* . . ."

In the case of *The Havana,* 89 Fed. (2d) 23, the Court said: (Text 24.)

> "In view of the storm warnings and the intensity which is known frequently to accompany such storms as the warnings foretold, we think the respondent did not sustain the burden and show such care as the situation demanded."

In the case of *Clyde S. S. Co. vs. U. S.,* 27 Fed. (2d) 727 (2 C. C. A.), the Court said: (Text 729.)

> *"Under the weather conditions that existed* this night, a master, anchoring in such crowded waters, *was in duty bound to exercise reasonable precaution to prevent every possible disaster* . . .".

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[21] Applied to all Masters and Vessels.
An alert watch would have seen the weather conditions recorded at N. A. S. and municipal airport. (R. 150 to 157 and R. 148.)

In the case of *The Djerissa,* 258 Fed. 949, the Court said: (Text 950.)

> ". . . The storm was an unusually violent one for a while, and it is true that several other vessels in the harbor dragged their anchors. But it by no means follows that, had the Newa's navigators exercised the nautical skill reasonably to be expected of them, *having regard to the admonition of the impending weather conditions,* . . . they probably would have entirely avoided danger, such as was encountered. . . ."

In the case of *The Philip J. Kenney,* 60 Fed. 2d 457 (text 458), the Court said:

> "It is thus obvious that, in order to sustain the defense of inevitable accident, the respondent had the burden of supporting not only their pleaded defense that the general cause of the collision was a gust of wind, but also that the gust of wind was of such unusual force as was not to be expected under the prevailing weather conditions and that there was not any intervening act of negligence on the part of the townig vessel. The evidence falls far short of sustaining this burden of proof."

In the case of the *Sea King,* 14 Fed. 2d 684, the Court said: (affirmed 29 Fed. 2d 5.)

> "In such case, inevitable accident applies only where both vessels have exercised every care to avoid the collision or where the storm which caused the dragging of anchor was so sudden and unexpected that it could not have been anticipated in the exercise of proper care and skill. . . . *An anchored barge*

which during a storm of which she was forewarned . . . held in fault for collision."

". . . I think it was the duty of the Nanticoke to have anticipated the trouble that ensued. . ."

In the case of the *Carl Konow,* 64 Fed. 815, the Court said:

". . . *The danger was apparent for hours previously; the approach of the storm was plainly visble,* and should have been provided for. . . ."

In the case of *The Yaye Maru,* 265 Fed. 850 (modified on other grounds), the Court said:

". . . . During the morning of that day, a northwest wind grew in force until, slightly before Noon, it became quite strong. Both ships were light, and felt the full force of the breeze, but with prompt and seamanlike disposition, neither should have dragged its anchor to any serious extent. . . ."

In the case of *Wier vs. Padre,* 29 Fed. 335, the Court said:

"Failure to see that a vessel is securely fastened when a storm arises will rend her responsible in damages if, during the storm, the vessel breaks loose and collides with another."

In the case of *The Barge,* 250 Fed. 476, 478, the Court said:

". . . *Weather conditions were something the Llanberis was bound to notice* and take proper precautions against . . .".

In the case of *The Drumcraig,* 133 Fed. 804, the Court said:

> ". . . I think it shown by a fair preponderance of the evidence that *the storm, although a violent one, gave sufficient warning of its approach* to have made it the duty of the master of the Loch Trool . . . and the failure to do this constitutes negligence for which the Loch Trool must respond in damages."

In the case of *The Terje Viken (The Bavaria),* 212 Fed. 1021, the Court said:

> ". . . Nevertheless, the Court thinks that the accident came about not as a result of the original anchorage . . . but because of omissions on the part of the steamship to properly and timely perform her duties, as well as in the manner of her original anchorage, as her *neglect to take precautions in the face of an impending storm,* especially as it was apparent that her then anchorage was insufficient . . ."

In the case of *The British Isles,* 264 Fed. 318, the Court said:

> ". . . A storm from the northwest was to be expected for hours before it came . . ."

In the case of *The Sharpee She,* 60 Fed. 928, the Court said:

> "The storm in this case was not of any extraordinary severity; *and where there is a reasonable notice of danger of drifting in storms* that are liable to arise, the owner takes the risk of reliance on means known to be of doubtful sufficiency . . .".

"THE WAITING BY THOSE WEATHERWISE MARINERS AFTER THE STORM BROKE UPON THEM AND THE WASTING OF PRECIOUS MOMENTS SEEKING TO TELL IF THEIR SHIPS WERE DRIFTING RATHER THAN THE TAKING OF PROMPT MEASURES TO PREVENT THEIR BEGINNING TO DRIFT:"[22]

In the case of *S. C. State Highway Dept. vs. U. S.*, 78 Supp. 598, text 607, one of the findings of negligence made by the court was as follows:

> "In failing to be ready to drop the second anchor; in failing to drop the second anchor;"

In the case of *Clyde S. S. Co. vs. U. S.*, 27 Fed. 2d 727, the destroyer McCall dropped anchor at 14 fathoms of water with 60 fathoms of chain. A wind was blowing 23 to 28 miles an hour. The ship had steam up for an emergency as the Commander feared bad weather. He turned in about 11:30 and left an inexperienced naval lieutenant in charge. The Commanche anchored in 30 feet of water using 60 fathoms of chain. The wind continued to in-

[22] S. S. RALEIGH, Capt. Blomberg (R. 615) testified that he noticed that the ship was dragging at 1:15 and he dropped the anchor (R. 626) at 1:30. See also Exhibit 12, Log of Raleigh.

S. S. SNELLING. Wind breezed up at 1:20. 1:32 heavy rain-squall with poor visibility and wind force 9 and observed ship dragging anchor. Log of Snelling (Ptf.'s Exh. 7). The Snelling did not ever drop its second anchor. (R. 473.)

S. S. LYMAN ABBOTT, Capt. Ekke, testified that at around 1 o'clock (R. 1051) he went to the wheel house, according to the Log (Ptf.'s Exh. 2), the chain was slacked out at 1:25 and Capt. Ekke (R. 691) testified that this was the correcttime. The Log shows that at 1:36 (and Capt. Ekke testified that this was the correct time R. 691), the Captain noticed that the ship was dragging, went forward and dropped the starboard anchor.

S. S. HENRY H. BLOOD, Capt. Willingham on watch did not testify. When Huppler, mate, was awakened at 1:30 (Ptf.'s Exh. 21) the ship was already dragging (R. 702), Huppler then dropped the second anchor.

crease and the McCall dragged anchor and collided with the Commanche. The Court said: (Text 728.)

> "A fault charged against the McCall and fully sustained, is her failure to have out sufficient chain or to put out more chain as the occasion required. . ."
>
> "Under the weather conditions that existed this night, a master, anchoring in such crowded waters was in duty bound to exercise reasonable precaution to prevent every possible disaster . . ."

In the case of *The Cuidad de Reus,* 185 Fed. 391, the Court said (text 395):

> ". . . If the anchor watch had seasonably discovered that she was dragging, it would have been his duty to call the master or an officer on deck. We cannot say that the collision might not have been avoided in that case by *ordinary nautical precaution such as paying out more chain, or dropping another anchor.*"

In the case of *The Djerissa,* 258 Fed. 949, the Court said:

> "Prior to and until a few minutes before the impact, the Djerissa had out her port anchor on 30 fathoms of chain and the Newa her starboard anchor on 50 fathoms. Shortly before the storm, the Djerissa paid out 30 fathoms additional chain and 15 or 20 minutes before the collision and as the storm approached, dropped her starboard anchor on 45 fathoms of chain. The Newa preceding the storm had 50 fathoms on her starboard anchor, and paid out 35 fathoms additional and about the time of the collision but too late to be of service, dropped her port anchor on 45 fathoms . . ."

The Court further said:

> ". . . Had the Newa's navigators exercised the nautical skill reasonably to be expected to them, having regard to the admonition of the impending weather conditions, *by paying out more chain on her starboard anchor, or by earlier dropping her port anchor,* they probably would have entirely avoided the danger, such as was encountered . . ."

In the case of the *Newa,* 267 Fed. 115, the Court held:

> "A collision between a vessel, which dragged her anchor in a severe windstorm, and another vessel anchored a quarter of a mile distant, *held solely due to the fault* of the drifting vessel *in neglecting to put out a second anchor until too near the other vessels to be of any avail,* although the storm had been threatening for several hours . . ."

In the case of the *Sea King,* 29 Fed. 2d. 5, the Court said:

> "The Rockville yawed, like the Sea King, but these barges did not collide, because their anchors held and they did not drift. The event confirms the opinion of the Court below that Nanticote collided with the Sea King because *she did not pay out chain or have two anchors down,* as the other barges did, until it was too late. We concur with the Court below as to the fault of the Nanticote."

In the case of *Carl Konow,* 64 Fed. 815, the Court said:

> "The danger was apparent for hours previously; the approach of the storm was plainly visible, and should have been provided for. *If both anchors were not*

down before the vessel commenced drifting she was clearly in fault. If they were down, her alleged case of inevitable accident is made out. Thus the inquiry is reduced to this narrow point, and so the parties have presented it. Was the second anchor down before the drifting occurred? I am satisfied it was not. . . ."

In the case of *W. I. Radcliffe*, 6 Fed. Supp. 783, the Court said:

"In view of the known defect in equipment, it was clearly *the duty* of the commanding officer or the officer on watch from 4 to 8 A. M. on the Sylvian Arrow, *to put out a second anchor when the wind increased* in force so as to render her position one of possible hazard to the Radcliffe."

In the case of *The Terje Viken (The Bavaria)*, 212 Fed. 1021, the Court said:

". . . The steamship was greately exposed by reason of her unusual freeboard to a storm such as then prevailed, and she should have anticipated the effect of the wind when she came to anchor, and have put out both anchors, whereas she dropped only one, and that on a chain of only 15 fathoms, which caused her to drag down on the barge. A *longer anchor chain would have lessened the probability of the anchor letting go by the turning of the ship, and with only one anchor out, clearly another should have been cast,* and as a matter of fact her port anchor was in the act of being turned loose when the collision occurred. It was not, however, dropped, *and at no time was there but one anchor out, when good seamanship and prudence required two.*"

In the case of the *British Isles*, 264, Fed. 318, the Court said:

> "A storm from the northwest was to be expected hours before it came, and *if more chain could have been paid out* as a precaution, *it is fair to infer that the starboard anchor would have held, or at least the drifting would have been slower, and there would have been time to let the port anchor go,* so the Bradgo would have held up sooner than she actually did. She had 120 fathoms of chain for the starboard and 115 fathoms for the port anchor."

In the case of *The Pelotas* (U. S. D. C. La.) 21 Fed. 2d 236, the Court said (text 240):

> ". . . The fact that she rubbed Omas a second time and that she probably fetched up on the Batture, or nearly so, seems to leave no doubt that it was she who was unsafely anchored, dragged anchor, and finally caused the collision by failing to drop her second anchor, paying out additional anchor chain instead. Here was a ship of 400 feet long, practically light, with a freeboard of 30 or 40 feet, presented to the wind, with scant berth, *in a crowded anchorage, paying out more chain* while swinging in a gale strong enough to drive her, and the other vessels at anchor there, against the river current, *instead of dropping her second anchor at once.* She is therefore resposible for the damage."

In the case of *The Anerly*, 58 Fed. 794, the Court said:

> ". . . Both barges had two anchors. Neither put out more than a single anchor except that the Merryman, a few minutes before she began to drag, when it was

too late, dropped her second anchor and soon drifted upon the N&W No. 4 which did not drop her second anchor at all. *To put out both anchors would have been but an ordinary precaution under the circumstances shown in evidence. . . .*"

In the case of the *Sapphire*, 11 Wall. 165, the Court said (text 170):

"On the other point, we agree with the District and Circuit Courts that the Sapphire was in fault. Had a second anchor been put out at an earlier period the collision in all probability would not have occurred. Indeed, the captain of the Sapphire gave order to the first officer that if she was likely to start, to put the second anchor down. But it was not done until the collision itself broke the ringstopper and let it down. *A more careful watch would have lead to the discovery of the vessel's having started and would have prevented the catastrophe which ensued.*" (Italics by counsel.)

In the case of the *Tungus*, 5 Fed. 2d 66, the Court held:

"Collision between vessels riding on anchors in a harbor during strong winds, *on failure of one vessel to drop second anchor* . . and failure of the other vessel to pay out more than 5 fathoms of chain when danger of collision became imminent held due to fault of both vessels." Note by counsel: (Unfortunately the bridge could not let out any additional chain.)

In the case of *The Barge*, 250 Fed. 376, 478, the Court said:

"When the gale came on, everything suggested the necessity of keeping a sharp lookout against dragging,

yet her anchor watch entirely failed to observe that the steamer was doing so until too late for her to avoid fouling the barge. *If they had noticed the danger in time, and had dropped the second anchor,* the accident would have been prevented. Their negligence stands unexplained and unexcused, and they have resorted to intentional false testimony in an effort to cover up their misconduct."

In the case of *The Box Leaf,* 265 Fed. 803, the Court said (text 804):

". . . A single anchor on a chain of 45 fathoms was calculated to bring about the very result that happended, namely, set the ship adrift in a reasonably high wind, bringing about the first collision, and continuing to drag until she fetched upon her full anchor chain of 120 fathoms. *Had she dropped her second anchor or placed her port anchor on a longer chain,* doubtless no collision would have happened; but when once adrift she continued to drag her stern until she fetched up on her full anchor chain. . ."

"THE ALLOWING OF THE A. B. SEAMAN ON WATCH TO GO TO SLEEP".[23]

The undisputed testimony is that under the circumstances which existed in this case, an alert watch should have been maintained. The deck watch should consist of an officer and an A. B. seaman. In no instance did it ap-

[23] The Trial Judge found that the appropriate deck watch requires one A. B. Seaman (R. 164).
RALEIGH, there was no A. B. seaman on deck watch (R. 626).
SNELLING, the only A. B. on board was in his bunk (R. 504).
LYMAN ABBOTT, there was no A. B. Seaman, member of the crew, on watch (R. 955-1071-1072); only two shore watchmen from a detective agency to protect property.
BLOOD, there was no A. B. seaman on watch. (R. 715.)

pear that prior to the striking of the storm there was an A. B. Seaman on duty on deck and it further appears that the officer on watch in every case, except that of the Snelling, was in his quarters.

In the case of *S. C. State Highway Department vs. U. S.* 78 Fed. Sup. 598, the Court held that the defendant was guilty of negligence in "in failing to have any member of the crew on deck as a watch in addition to this watchman."

In the case of the *Newa*, 267 Fed. 115, the Court said:

> ". . . The burden is on the moving vessel to show that it had a proper watch on the deck and that she discovered the dragging as soon as it commenced. . ."

In the case of the *Cuidad de Reus, supra*, the Court said:

> "If the anchor watch had seasonably discovered that she was dragging, it would have been his duty to call the mate or an officer on deck."

In the case of *Cuyamel Fruit Company vs. Nedland*, (5 C. C. A.) 19 Fed. 2d 489, the Court said:

> "Situation of an anchored vessel may be such as to subject her to duty of maintaining competent anchor watch, ready to give her chain and sheer her clear of approaching vessel, or adopt other suitable measures to avoid threatened collision through danger was created thru other vessel's fault."

In the case of the *Herm,* 267 Fed. 375, (4 CCA) the Court said:

> ". . . Ordinary care required every master thus warned to be ready, and to use all his skill and every available appliance and method to hold his anchorage. So far from discharging this duty, both the master and mate of the McDonald left her in charge of Dowler, a comparatively inexperienced seaman about 19 years old, from whom capacity to meet an emergency was not to be expected. . . . Young Dowler, instead of keeping watch, was asleep while the McDonald was dragging, until a very short time before the collision. . ."
>
> ". . . We can see no excuse for failing to try to stop their vessel by the use of two anchors (citing cases). This failure to use every means in their power to hold their vessel was negligence on the part of the navigator of the McDonald and Coastwise."
>
> "AND THE KEEPING OF A MATE ON CONTINUOUS WATCH FROM MAY 8 TO MAY 20 AND PERMITTING HIM TO GO TO BED AT 12 O'CLOCK ON THE NIGHT OF THE STORM AND TO BE AWAKENED ONLY BY THE STORM'S FURY."[24]

In the case of *S. C. State Highway Dept. vs. U. S.* 78 Fed. Supp. 598, text 607, the Court found the following to be negligence:

> "In putting the ship in charge of an officer who had been on duty an excessive period without relief or sleep."

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[24] SS RALEIGH:
This testimony is undisputed and was found to be true by the Court (R. 187). The Court has already commented that this was a violation of law.

In the case of *The Denali,* 105 Fed. 2d 413, 416 (CCA 9) certiorari denied 311 U. S. 687, the Court held the statute (46 USCA 223) was enacted for the purpose of insuring safe navigation, and the Court said (text 418):

> "The vessel was wrecked by the fault of the navigation of the assistant mate Obert who was assisted 'by the third mate, who acted under Obert's orders. Since both men were serving under a *watch system used in violation of the statute,* the burden falls upon the Denali's owner of showing not merely that the two watch system probably did not, but that it could not have been contributed to the stranding."

"THE FAILURE TO HAVE THE FULCRUM ON THE WINDLASS OF THE STARBOARD ANCHOR OF THE SNELLING FIXED AND REPLACED PROMPTLY."[25]

If a ship has defective equipment and such defective equipment contributes to the happening of an accident, this is negligence. The Snelling did not drop the starboard anchor because it was aware of the fact that if it once dropped the anchor, it could not again raise it.

"THE FAILURE TO PAY OUT MORE CHAIN AND TO DROP ADDITIONAL ANCHORS." [26]

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[25] The Court found this to be an "uncontroverted Fact". (R. 164.)

[26] S. S. RALEIGH. Blomberg (the Captain) testified that he knew the ship was dragging at 1:15 (R. 622), he did not drop the second anchor until 1:30 (R. 627), that he collided with the bridge at 1:45 (R. 620). There was testimony that the Raleigh collided with the bridge at about 2:00 a. m. There was testimony that the starboard anchor was secured with a devil's claw, which is an improper practice in port. (R. 860.)

SNELLING. This ship never did drop its starboard anchor.

LYMAN ABBOTT. Ekke (Captain) testified that the starboard anchor was dropped at 1:36; Mate Huppler (R. 724) of the Blood testified that he heard the second anchor go at about the time that the Lyman Abbott collided with the Blood, at 2:00 a. m. (R. 725). Lawler (R. 747) of the Blood also testified that he

The following cases, quotations from which heretofore appear in this brief, sustain this finding as a matter of law:

S. C. State Highway Dept. v. U. S. 78 Fed. Supp. 598, Text 607.
Clyde S. S. Co. v. U. S., 27 Fed. 2d 727.
The Cuidad de Reus, 185 Fed. 391.
The Djerissa, 258 Fed. 949.
The Newa, 267 Fed. 115.
The Sea King, 29 Fed. 2d 5.
Carl Konow, 64 Fed. 815.
W. I. Radcliffe, 6 Fed. Supp. 783.
The Terje Viken (The Bavaria), 212 Fed. 1021.
The British Isles, 264 Fed. 318.
The Pelotas (U. S. D. C. La.), 21 Fed. 2d 236.
The Anerly, 58 Fed. 794.
The Sapphire, 11 Wall. 165.
The Tungus, 5 Fed. 2d 66.
The Barge, 250 Fed. 476.
The Box Leaf, 265 Fed. 803.

"THE FAILURE TO UTILIZE STEAM SEASONABLY."[27]

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heard the anchor go at about this time. Hall (crew of Abbott) testified that he never did hear the anchor go on the Lyman Abbott.

S. S. HENRY H. BLOOD. Huppler testified (R. 702) that he woke up and discovered that the ship was dragging, ran forward dropped the starboard anchor at about 1:30 (R. 703, 720). He slacked out on the anchor chain and the vessel fetched up without striking the bridge. (R. 728.) The Abbott collided with the Blood and both struck the bridge. (R. 706.)

[27] S. S. RALEIGH. The engines were ready for use 15 or 20 minutes before the Raleigh struck the bridge at 1:45 (R. 620), Boyett (R. 457).

S. S. LYMAN ABBOTT. According to the Log (Ptf.'s Exh. 17), the engines were ready at 1:45 a. m. and the collision with the Blood did not occur until 1:55 a. m.; according to the log of the Abbott, the engines were ready for at least 10 minutes prior to the collision and according to the Log of the Henry H. Blood (Ptf.'s Exh. 20-21), the collision occurred at 2:00 a. m. and again at 2:15 a. m. so that according to the Blood at least 15 minutes elapsed

It is believed that it will be unnecessary to cite authority to the effect that it was the duty of the masters of the several vessels when threatening weather appeared upon the horizon and before the storm broke to order the engines made ready for maneuvering if the same became necessary. The engines should have been ready prior to the time the storm broke.

A limited number of cases will be cited.

In the case of *The Bacchus*, 267 Fed. 468, the facts showed that a bark and a steamship were both anchored. The Court found that the bark, by the influence of the tide, dragged anchor, which caused the collision. It found, however, that the steamship was also at fault because it should have known at least three hours before the collision that the collision was about to occur and should have used its engines. The Court said (text 469):

> "*Had the Bacchus had steam up, it would have been a simple matter to have eased upon her anchor*, and moved forward or aft. The testimony is that it would *only have taken some 20 minutes for her to have gotten up steam.* Spencer on Mariner Collisions, 201; the Ciudad de Reus, 185 Fed. 391, 107 CCA 447."

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during which the engines could have been used before the first collision and 30 minutes before the second collision.

S. S. HENRY H. BLOOD. The Log of the Henry H. Blood (Ptf.'s Exh. 20-21) indicates that the main engines were ready immediately preceding the time that the Lyman Abbott rammed the Blood the first time at 2 a. m. and it further appears that 15 minutes elapsed before the Abbott rammed the Blood the second time. The engines of the Blood were not used at that time. (Ptf.'s Exh. 20-21.)

S. S. SNELLING: The engines were ready at 2 A. M. (R. 899) and were not used until 2:15 (R. 899).

In the case of *The Baron Jedburgh,* 299 Fed. 961, 962, the Court said:

> "A steamship, light, anchored in a harbor at night, which dragged her anchors during a gradually increasing gale, and drifted into and broke a log boom, within a half a mile of her anchorage, held in fault for not sooner having her engines in use. . ."
>
> "It must be conceded that the velocity of the wind at 4 o'clock on December 25 was so very unusual as to warrant its being described 'extraordinary', at least so far as this Court is concerned. Nevertheless, it could not be held that the cause of damage was vis major, for it was no more than a gale at any time, as that term is understood by Beaufort's Scale and is understood by the mariners. The witnesses in the case have not spoken of the wind other than as a 'gale', a 'full gale' or 'strong gale'. The Snap, (B. C.) 24 Fed. 292, 293."
>
> "The Jedburg *is held in fault for not having her engines in use before she struck the raft;* anchored as she was, near these logs on the leeshore, under the circumstances this was a clear fault; no fault upon the part of the rafts have been shown. Claimant is allowed full damage to the rafts, resulting from the collision."

In the case of *The Ciudad de Reus,* 185 Fed. 391, the Court said (text 395):

> "The collision not being due to inscrutable fault, the final question is: was it inevitable? Plainly not. Both vessels kept the most negligent watch. Neither discovered the dangerous proximity until, in the case of the watch on the Reus, the collision was imminent

and, in the case of the Maraval, until it had actually occurred . . . We cannot say that the collision might not have been avoided in that case by ordinary nautical precautions such as paving out more chain, or dropping another anchor. Likewise, the Maraval, having steam up, might have altered her position or even have raised her anchor and moved out to a safe anchorage, or might have shortened or paid out chain, and so might have enabled the Reus to pass clear."

In the case of *The Tungus,* 5 Fed. 2d 66, the Court said:

"Collision between the vessels riding on anchors in harbor during strong wind, *on the failure of one vessel to . . . get up steam until about time of collision,* and failure of other vessel to pay out more than five fathoms of chain when danger of collision, became imminent, held due to fault of both vessels."

"THE DECLINATION OF MASTER AND MATE TO HEED THE WARNINGS OF THE NERVOUS AND STORM CONSCIOUS ANDERSON AND HALL;"[28]

The attention of the master and the mate on the S. S. Lyman Abbott on watch was specifically called to the condition of the weather, and the engineer on watch asked

[28] S. S. LYMAN ABBOTT:

Anderson, (Engineer on watch): From around 10 o'clock on, noticed clouds, squally weather, thought there might be a blow. (R. 580.) Twice notified the Mate who was supposed to be on watch and later the Captain. Both were in their quarters (R. 580-581), neither left their quarters (R. 580), the wind became stronger, clouds gathered in the SW and there was lightning and thunder (R. 585, 593, 595).

Hall, (Engine Room Crew) had previously served as member of deck crew (R. 758) between 11 o'clock and midnight he saw dark clouds boiling over the Naval Air Station (R. 760), saw lightning which was increasing and at Anderson's instruction, notified the mate who was on watch, who was in his bunk and ignored warning (R. 760-761).

the deck officers and commander of the ship to look at the weather and take appropriate action, but neither of these officers left their quarters. It is believed that such conduct is so negligent that the citation of authority is wholly unnecessary.

> "THE INEBRIACY AND CONSEQUENT STUPIDITY OF CAPT. BLOMBERG, AS UNWILLINGLY REVEALED BY THE DEFENDANT'S OWN WITNESS;"[29]

It is believed that it is unnecessary to cite authority to the effect that it is negligence for a captain in command of a ship, under the circumstances which existed in this case, to drink himself into stupidity so that he cannot properly exercise command of his ship. Every act of Capt. Blomberg indicates an inability to comprehend the situation and a complete incapacity to meet the exigencies of the occasion.

> "ALL IN THE FACE OF THE KNOWLEDGE: (A) THAT THESE UNLOADED SHIPS WERE DIFFICULT TO HANDLE IN A STORM; (B) OF THE PRESENCE IN THE HARBOR OF SO MANY UNLOADED VESSELS IN REASONABLE PROXIMITY TO THE BRIDGE AND THE SHORE INSTALLATIONS: EXEMPLIFY A FAILURE TO EXERCISE THAT DEGREE OF CARE WHICH THE CIRCUMSTANCES REQUIRED: AND WHILE ALL OF THESE FAULTS WERE NOT PRESENT ON EACH AND EVERY VESSEL, IT CANNOT BE SAID THAT

[29] S. S. WALTER RALEIGH:
Stewart, disinterested def.'s witness, testified to Capt. Blomberg's condition (R. 861-862).

ANY OF THE FOUR ACTED WITH THAT DEGREE OF CARE AND CAUTION THAT THE CIRCUMSTANCES REQUIRED." [30]

The foregoing findings of fact by the Court and adjudication of negligence on the part of the several officers and crews of the ship determines that the plaintiffs are entitled to recover.

In addition to finding that the defendants were negligent, the Court further considered the affirmative defenses of inevitable accidents and act of God. The Court found that the defendants had failed to sustain the burden of proof and had failed to explain, in a satisfactory manner, why the accident occurred. The Court said: (R. 187.)

"TO SAY THE LEAST, THEY EACH FAILED TO DISCHARGE THE BURDEN OF PROOF WHICH THE LAW CAST UPON THEM TO SHOW DESPITE THE VIS MAJOR HUMAN SKILL AND PRECAUTION OR A PROPER DISPLAY OF NAUTICAL SKILL COULD NOT HAVE PREVENTED THE COLLISION." [31]

In the case of *U. S. v. S. C. Highway Department*, 171 Fed. 2d 893, the Court said (text 896).

"There was no fault imputable to those in charge of the bridge, and the vessel must be held responsible for the damage resulting from the collision 'unless she can show affirmatively that the drifting was the result of inevitable accident, or a vis major, which human skill and precaution and a proper display of nautical skill could not have prevented."

[30] Applicable to all ships.
[31] "Further Findings of Fact by Court" (R. 187-188).

In the case of *The Viriginia Ehrman and The Agnese,* 24 L. Ed. 890; 97 U. S. 309, text 315, the Court held:

> "Vessels in motion are required to keep out of the way of vessels at anchor, if the latter is without fault, unless it appears that the collision was the result of inevitable accident; the rule being that the vessel in motion must exonerate herself from blame, by showing that it was not in her power to prevent the collision by adopting any practicable precautions."

In the case of *The Havana,* 89 Fed. 2d 23, the Court said:

> "The collision of the Dalheart with a moored vessel called for an explanation and put upon her the burden of showing that the exercise of reasonable nautical skill would not have prevented the accident."

In the case of *The Ciudad de Reus,* 185 Fed. 391, the Reus collided with the Maraval which was at anchor. The Court said (text 395.)

> "She is bound to show that the collision was inevitable. To do so she must exclude all causes due to her own negligence."

In the case of the *Anna C. Minch,* 260 Fed. 522, 271 Fed. 192, the Court held as follows:

> "The law allows the party or vessel inflicting an injury by collision to be relieved of responsibility by proving that the accident was inevitable in the technical admiralty sense; that is, that it was of such a sort that it would not have been prevented by the use of that degree of reasonable care and attention

which the situation demanded, but the burden is heavily upon the party asserting such a defense."

In the case of the *Djerissa,* 258 Fed. 949, the Court said:

"The case turns almost entirely upon whether the Newa, the burdened vessel, met the obligation imposed on her under the law, to entitle her to invoke the defense of inevitable accident. She must establish freedom from fault on her part to escape liability. . ."

In the case of the *Lackawanna,* 210 Fed. 262, 264, 127 CCA 80, the Court said:

"The law allows her to relieve herself (if she can) of that responsibility by proving that the accident was inevitable in the technical admiralty sense. That is, that it was of such a sort that it would not have been prevented by the use of that degree of reasonable care and attention which the situation demanded. The burden, of course, is heavily upon the vessel asserting such a defense. . ."

In the case of *Mabey and Cooper,* 14 Wall. 204, the Court defined inevitable accident as follows (text 215).

"Inevitable accident, as applied to a case of this description, must be understood to mean a collision which occurs when both parties have *endeavored, by every means in their power, with due care and caution, and a proper display of nautical skill,* to prevent the occurrence of the accident, and where the proof shows that it occurred in spite of everything that nautical skill, care, or precaution could do to keep the vessels from coming together." (Italics by Counsel.)

In the case of *The Maryland,* 182 Fed. 829, the Court held (text 831):

> "The legal questions contended for by the libellant that before the Maryland can escape liability for the collision with the encumbered vessel, because of inevitable accident, she must show freedom from fault on her part may be conceded. If she was in default in the particulars claimed by the libellant, or any of them, constituting a contributing cause of the collision, she cannot escape responsibility upon the theory of the accident being inevitable. (Citing cases.)"

In the case of *Union Steamship Co. v. The New York and Virginia Steamship Co.*, 24 How. 307, the Court held (text 313):

> "Plainly, therefore, it is only when the disaster happens from natural causes, and without negligence or fault on either side, that the defense set up in this case can be admitted. Inevitable accident, as applied to cases of this description, must be understood to mean 'a collision which occurs when both parties have endeavored, by every means in their power, with due care and caution, and a proper display of nautical skill, to prevent the occurrence of the accident. The Locklibo, 3 W. Rob. 318. The John Frazer, 21 How. 184. It is not inevitable accident, as was well remarked by the learned Judge in the case of the Juliet Erskine, 6 notes of cases, 636, where a master proceeds carelessly on his voyage, and after circumstances arise, when it is too late for him to do what is fit and proper to be done.' *He must show that he acted seasonably, and that 'he did everything which an experienced mariner could do, adopting*

ordinary caution', and that the collision ensued in spite of such exertions. . . . Unless the rule was so, it would follow that the master might neglect the *special precautions which are often necessary* on a dark night and when a collision had occurred in consequence of such neglect he might successfully defend himself upon the ground that the disaster had happened from the character of the night and not from any want of exertion on his part to prevent it." (Italics by Counsel.)

In the case of *Cherente Steamship Co. v. U. S.*, 12 Fed. 2d 412, 413, the Court said:

> "The doctrine of inevitable accident has no application where there is a lack of a proper display of nautical skill."

In the case of the *Morning Light*, 2 Wall. 550, text 560, the Court said:

> "Inevitable accident says Dr. Lushington, in the case of 'The Europa' (2 English Law and Equity, 559) must be considered as a relative term, and must be construed not absolutely but reasonably with regard to the circumstances of each particular case. Viewed in that light, inevitable accident may be regarded as an occurrence *which the party charged with the collision could not possibly prevent by the exercise of ordinary care, caution and maritime skill.*" (Italics by Counsel.)

See also:

Eagle Oil Transport Co. Ltd. v. Bowers Southern Dredging Co., (5th CCA) 166 380; 255 Fed. 52. U. S. v. Bruce Dry Dock, (5th CCA) 65 Fed. 2d 938. The Blackheath (SD Ala.), 154 Fed. 78.

In the case of *Davis v. Ivey,* 93 Fla. 387, 112 So. 264, the Court said (text 271):

"It appears to us that these charges clearly and correctly stated the principles of law involved. The Supreme Court of Alabama in Smith v. Western Ry. Co., 91 Ala. 455, 8 So. 754, 11 L. R. A. 619, 24 Am. St. Rep. 929, in considering the liability of a railroad company for damages caused by a heavy flood, said:

" 'While it is true that no human agency can prevent or stay an act of God, the act itself being that of omnipotence and irresistible, it is frequently the case that the results or natural consequences of an act of God, *by the exercise of reasonable foresight and prudence,* may be foreseen, and guarded against. When this can be done by the exercise of reasonable diligence and prudence, a failure to do so would be negligence, and subject the party upon whom this duty devolved to damages, although the original cause was an act of God.' "

In the case of *Atlantic Coast Line v. Hendry* 112 Fla. 391, 150 So. 598, the Court said:

"The defense of vis major may be successfully interposed in an action for damages resulting solely from an act of God; but *if the defendant's negligence is a present contributing proximate cause, which, com-*

mingled with the act of God, produces the injury, then the defendant is liable notwithstanding the act of God. Davis v. Ivey, 93 Fla. 387, 112 So. 264; Case Note 29 L. R. A. (N. S.) 663; Case note 42 L. R. A. (N. S.) 709.

"The *burden is on the defendant who interposes the defense* of vis major to show that the damages resulted solely from the act of God and that it contributed in no way thereto."

Answer to the Argument of Petitioner on Question One.

As stated before, the defendant seeks to isolate two statements from the "Findings of Fact" and "Conclusions of Law" of the trial judge, in an effort to reverse this case. The first statement selected by counsel for such purpose is as follows:

"* * * each vessel must show that it exercised proper care under the circumstances, and this case will be determined by what was due care under the circumstances. If the *masters* of these vessels were merely required to exercise ordinary or reasonable care *after the officers of these vessels discovered their peril,* then the Defendant would doubtless be entitled to a judgment in its favor. We, therefore, must determine what was the degree of caution and care which the circumstances demanded of the masters of these vessels. (R. 180.) (Italics by counsel).

This statement is preceded by a full finding as to the conditions existing before and during the squall and a statement of the theories of the case of the parties and is followed immediately by a summary of the conditions

which existed immediately befort the squall (see pages 27, 28 of this brief). The above statement must be read in connection with this summary and the entire opinion. The construction contended for by the defendant is distorted, inconsistent and not in accord with the general trend of the opinion of the Court. The Court of Appeals rejected the construction contended for by the defendants. (See page 4 of this brief; R. 1314.)

The Court held there was a duty on the *masters* to exercise reasonable and ordinary care at all times—not merely after the (other) "officers" discovered the peril of the vessels.

The evidence showed in each instance the peril of the vessel was discovered by a mate and the trial judge found that the masters had adequate warning of an emergency which required the taking of precautions, which they did not do.

It is apparent from consideration of the entire opinion that Judge Waller held:

(a) That masters of vessels must exercise ordinary and reasonable care to anticipate dangers which are incident to a storm when a storm threatens on the horizon.

(b) That masters of vessels are required to take ordinary or reasonable precautions with respect to the navigation of their vessels when a storm threatens on the horizon.

(c) That masters of vessels are required to act with promptness when an emergency arises and not wait until the *"officers of the vessels discovered their peril . . ."*.

The contention of the defendant, that Judge Waller found—

(a) Drunkenness on the part of the Captain in command of the RALEIGH,

(b) the failure of ALL OF THE MASTERS to heed the warnings of the threatening sky and pay no attention until adrift,

(c) the waiting by ALL OF THE MASTERS until after the storm broke instead of taking measures to prevent drafting,

(d) the allowing of the officers and seamen on watch on the RALEIGH, ABBOTT and BLOOD to go to sleep,

(e) the keeping of a mate on the RALEIGH on duty twenty-four hours a day for twelve days in violation of law,

(f) the failure to maintain the S. S. SNELLING in such a condition that it could safely use more than one anchor,

(g) the failure of *all of the masters* to promptly drop additional anchors,

(h) the failure of the RALEIGH, ABBOTT and BLOOD to utilize steam reasonably,

(i) the failure of the master and mate of the ABBOTT to heed the warnings of their own engineer and fireman as to the dangerous condition of the weather, and

(j) the failure of the BLOOD to have any officer or seaman on watch,

was the exercise of ordinary and reasonable care, is an absurd conclusion and contention with respect to the findings made by a jurist of many years experience.

The second statement from "Conclusions of Law" selected by petitioner for attack is as follows:

> "It was the duty of the masters of these vessels to know and to understand their responsibility in the situation that they were in on the occasion in question. Ordinary care or reasonable care was not the test, but a very high degree of care and caution were required *under the circumstances present at the time.* (R. 181-182.)

An examination of the entire "Findings of Fact" and "Conclusions of Law" clearly discloses that the Court was merely stating that *under the circumstances existing* at that time, which the Court summarized, *ordinary care and reasonable care was a high degree of care* and alertness to the situation and indicated the necessity of taking reasonable precautions in order to avert injury to another.

Negligence is the failure to observe for the protection of another's interest such care, precaution and vigilance as the circumstances justly demand, and the want of which

causes an injury. What constitutes "ordinary and reasonable care" varies with the circumstances. It cannot be measured or ascertained by any fixed or inflexible standard, because the quoted words are themselves relative terms, and what, under some conditions would be ordinary and reasonable diligence might, under other conditions, amount to even gross negligence.[32]

Ordinary and reasonable care under the circumstances, as summarized by the trial judge, was a high degree of

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[32] A. C. L. vs. Watkins, 97 Fla. 350, 121 So. 95.

In 65 C. J. S. 313, the following rule is set forth:

"As used in this connection, the word 'circumstances' is comprehensive and embraces the operation of the forces of nature as far as they bear on, or relate to, the happening of the central event. Each case must depend on, and be decided by, its own particular or peculiar facts and circumstances, and so varying are the factors which contribute to produce a result that no hard-and-fast rule may find practical application in the great majority of cases."

The rule is clearly set forth in *45 C. J. 689*, as follows:

"There is no such thing as absolute negligence, but negligence is always a relative or comparative term, as is also due, reasonable, or ordinary care. Accordingly, the circumstances of the particular case are always to be taken into consideration in determining whether the person sought to be charged with liability for an injury to another or the property of another has exercised the care which the law requires of him or has been guilty of negligence. *The amount or degree of diligence and caution which is necessary to constitute due, reasonable, or ordinary care changes with changing conditions, and varies according to the exigencies which require vigilance and attention, so that the same conduct may under one set of circumstances or in particular surroundings, constitute sufficient care, and under other circumstances or in other surroundings, be negligent or even amount to gross negligence or wantonness.* Indeed, so great is the effect of circumstances that the same conduct, under different circumstances or in different situations may range from the highest degree of care to gross negligence. (Italics by Counsel.)

In the case of *Pope v. Redding*, 304 Pa. 326, 156 Atl. 106, 109, the Court said:

"A captain of a ship which enters a certain area of the North Atlantic at the time of the year when icebergs are drifting southward, must navigate his ship with that cautious care which ordinary knowledge of and respect for the power of the icebergs demand. The want of such care and caution caused the loss of the Titanic."

care because of the threatened danger.[33]

The petitioner takes a flight into the realm of speculation and fancy by stating its conception as to the basis upon which that decision of the Circuit Court of Appeals was predicated. The decision was predicated clearly upon the language of the Court and the "Findings of Fact" made by the trial judge. The trial judge did state that the defendant claimed it had taken precautions adequate for what might then be foreseen *but* the trial judge rejected the contention and held that adequate care had not been taken to guard against foreseeable dangers. Petitioner's suggestion that the Judge "did not, and could not, find that the violence of the storm was foreseeable by the exercise of normal care", is directly contrary to the findings made by the Court.[34]

The second suggestion by petitioner as the possible basis for the Court of Appeals' opinion is to the effect that the Court may have felt that the findings of

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[33] In *38 Am. Jur.* (Negligence, para. 29), 673, the following rule is stated:

"... The degree of diligence which one must observe in the performance of his common law duty to use care to prevent injury to others is ordinary care or reasonable care. ... Both ordinary care and reasonable care mean due care, that is, care according to the circumstances of the case. In other words, ordinary care depends upon the responsibility which is cast upon the actor by the circumstances under which he acts or refrains from acting. *The greater the danger which is known or is reasonably to be anticipated, the greater is the degree of care which is required to be observed. ... The surrounding facts and circumstances are of controlling importance. What may be deemed ordinary care in one case, may under different surroundings and circumstances, be negligence. ... The rule which requires ordinary care prevails at all times, but ordinary care may be a high degree of care under some circumstances and a slight degree of care under other circumstances. ...*"

[34] See Par. 18, R. 165; par. 1, R. 165; par. 8, R. 181; Further Findings of Fact (R. 187).

> "Specific negligent conduct on the part of the officers and crew of the individual ships were the basis of the ultimate finding of negligence and that these specific acts were measured by the proper standard of care".

The Judge did find specific acts of negligence as well as finding of facts from which a finding of negligence was inescapable; however, petitioner attempts to evade the irresistible conclusion that such negligent acts contributed to the happening of the disaster. Petitioner has completely overlooked certain comments and findings made by the Court [35] and the further fact that the burden was upon the defendant to establish by a preponderance of the evidence that vis major, or inevitable accident, was the *sole* and only cause of the disaster.[36]

The petitioner further says:

> ". . . thus, fourteen of the twenty-one ships in the harbor dragged anchor in the storm but only those nearest the bridge struck it (R. 180); there were, apparently, no such specific acts of negligence on the part of all fourteen of the ships as that alleged on the part of the four which were the subject of the suit."

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35 "To that end these mariners (def.'s expert witnesses) have shown . . . None of them, however, has said the wind was of such a velocity that the ships could not have been prevented from dragging anchor." (R. 178, 85 F. Sup. 498.)

"It was demonstrated that six or seven of the vessels in the same harbor did prevent their vessels from dragging anchor. It was shown that sixteen of the vessels did not collide with the bridge. This showing, though not positive, is a strong argument for the inference that the four vessels could also have been prevented from crashing into the bridge by the exercise of due care, caution and foresight."

36 (R. 182) ". . . I think this burden is on the defendant whenever it pleads in defense either inevitable accident or act of God."

The trial judge very properly stated that the law of averages cannot be made the determining factor with respect to negligence.[37]

There were *forty-one ships* in the harbor and *twenty-one ships were anchored* in Pensacola Bay. A proper detailed analysis of the logs, which were in evidence before the trial judge, disclosed the following:[37a]

1. The *plaintiff* was able to obtain *only eighteen* of the twenty-one logs relating to the anchored ships.

2. It appears from an examination of these eighteen logs that seven of the ships did not drag anchor during the blow (1:30 to 2:00 A. M.):

S. S. VAN NUYS
S. S. F. A. C. MUEHLENBERG
S. S. GABRIEL FRANCHERE
S. S. SENGTELLER
S. S. WILLIAM LYON PHELPS
S. S. JOHN W. BURGESS
S. S. TABITHA BROWN

3. Of the remaining eleven ships, *seven* of them *fetched* up promptly when the second anchor was dropped:

S. S. BUTTON GWINNETT
S. S. SALMON P. CHASE
S. S. LUCRETIA MOTT
S. S. JOSEPH HEWES
S. S. HAROLD T. ANDREWS
S. S. STEPHEN GIRARD

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[37] (R. 180.)
[37a] Originals deposited with CCA Exhibits 7 thru 43.

S. S. HENRY H. BLOOD [38]

4. Of the remaining *four*, one of them promptly dropped the second anchor (apparently fetched up) and then used its engines to maneuver:

S. S. PIERRE SOULE

5. Of the remaining ships, we find the following:

S. S. SNELLING never dropped her second anchor.

S. S. WALTER RALEIGH dropped an anchor just about the time it struck the bridge.

S. S. LYMAN ABBOTT dropped an anchor just about the time it struck the bridge or just after it struck the Henry H. Blood forcing the Blood into the bridge.[38]

From the analysis of the logs and from the testimony, it clearly appears that virtually all of the masters except those involved in this suit, exercised good seamanship.

The mere fact that other ships may have failed to take reasonable precautions or other crews may have been negligent is not a defense to the claim of the plaintiffs [39]

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[38] The BLOOD fetched up with her stern touching or about to touch the bridge (R. 175).
When rammed by the ABBOTT she damaged the bridge. See Note. 6.
Trial Judge's opinion (R. 175, 85 F. Sup. 497).

[39] In the case of *The Djerissa*, 258 F. 949, the Court said:
"The storm was an unusually violent one for a while and it is true that several other vessels in the harbor dragged their anchors. But it in no means follows that, had the Newa's navigators exercised the nautical skill reasonably to be expected of them. . . ."
In the case of *The Anerly*, 58 F. 794, the Court said:
"The neglect of reasonable precautions is not to be justified by citing instances of the negligence of other vessels. I do not find any case in which, under analogous circumstances, such accidents have been adjudged inevitable. On the contrary, where

and custom does not excuse inherent negligence.[40]

It is respectfully submitted that the testimony in the case, found to be true by the Court, overwhelmingly establishes negligence on the part of the defendant and upon each vessel that collided with the bridge. The Court, in applying the law to the facts appropriately considered all of the evidence which was introduced and found that the defendant had not exercised the reasonable and ordinary care required under the circumstances in the case, which was a high degree of care.

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there are known indications of the danger of drifting from any extraordinary causes, whether from ice, storm or position, ordinary prudence requires that both anchors be let go; and the omission of this precaution is held to be at the vessel's risk. . . . ."

In the case of *Mary E. Cuff*, 84 F. 718, the Court said:

". . . They anchored their boat in a place of convenience. They left it in the usual way. They cast but one anchor, when they had two at hand. They left no one on board to guard and watch the vessel during this stormy night. This was negligence. . . . The fact that others cared for their vessels, on this night, in the same way, does not excuse or acquit the claimant of his neglect. There must be a decree for the libellants with an order of reference to ascertain the amount of damages."

[40] In the case of *Seaboard Airline Ry. Co. vs. Watson*, 94 Fla. 571, 113 So. 716, text 718, the Court said:

". . . If a party's act is inherently negligent, he cannot justify it by showing that he was customarily negligent in the performance of similar acts. Customary negligence is no justification for the particular negligence complained of. . . ."

In the case of *Atlantic Coastline R. Co. vs. Webb*, 112 Fla. 449, 150 So. 741, the Court said:

"Custom does not excuse what is inherently negligent. What ought to be done is ultimately to be determined by a standard of reasonable prudence, whether usually complied with or not. . . ."

SECOND QUESTION.

WHETHER, IN AN ACTION UNDER THE FEDERAL TORT CLAIMS ACT PREDICATED ON NEGLIGENT DAMAGE TO A STATE BRIDGE, THE RESPONDENT MAY, IN ADDITION TO THE COST OF REPAIRS TO THE BRIDGE, ALSO RECOVER THE COST OF BUILDING, MAINTAINING, AND REMOVING DETOURS AROUND THE DAMAGED SECTIONS OF THE BRIDGE WHILE IT WAS BEING REPAIRED.

This contention has been presented to five judges on thatt separate occasions.[40a]

District Judge DeVane, in striking a part of the answer urging this matter as a defense, said; (R. 91, 78 F. Sup. 278.)

> "The Eleventh Defense raises the question as to the right of plaintiff to recover the cost of constructing and removing temporary wooden detour bridges constructed for the purpose of keeping the State highway open to traffic while the permanent structure was being repaired. Counsel for plaintiff and defendant each cited numerous cases in support of their side of this legal issue. The Court has reviewed many of these cases and is of the opinion that the sound law not only should be but is with the plaintiff. The State highway of which the Pensacola Bay Bridge is a part, is one of the important Federal Aid highways into and across the State of Florida and to hold that the cost of constructing and removing the temporary wooden detour bridges, constructed for the pur-

[40a] District Judge DeVane (R. 92, 78 F. Supp. 278); Circuit Judge Waller (Trial Judge); (Motion for new trial, R. 204); (On appeal CCA, R. 1315, 189 F. (2) 591).

pose of keeping this highway open to traffic while the permanent structure was being repaired, is not a necessary part of the over-all construction costs of the repairs, would be to blindly ignore the importance of present-day use of arterial highways. Such a holding in this day would be just as outmoded as for the Court to hold that the Federal Government cannot provide Federal Aid for the construction of arterial highways. The motion to strike this Defense will be granted."

Points to be Argued under Question Two.

1. The State has an inherent right to recover damages to its roads and has merely designated the State Road Department as an appropriate agency to prosecute actions pertaining thereto and did not create a new cause of action.

2. The Legislature did not intend to limit or restrict the State Road Department to the recovery of specified damages leaving the right of recovery of other damages remaining in the State.

3. That the trial judges and Circuit Court of Appeals properly construed the Florida Statutes in the proceedings below.

The collisions occurred on May 20, 1946, rendering the Bridge incapable of handling traffic by reason of complete breaks therein as well as dangerous misalignments. (R. 257-259.) The plaintiff was unable to complete repairs to the permanent structure before May 2, 1947, almost one year after the collision. Detours around the damaged portions of the bridge were completed July 13, 1946. (R. 258.)

Escambia County, the owner of the bridge, had entered into a lease purchase agreement with the plaintiff prior to the injury whereby the plaintiff would pay a stipulated rental for a period of thirty years and after all payments had been made the absolute ownership of the bridge would vest in the plaintiff (R. 24). During the term of the lease, the plaintiff was obligated to do certain things, including the keeping of the bridge in "sound operating condition".[41]

The Circuit Court of Appeals, in affirming the action of Judge DeVane in striking a part of the answer and Circuit Judge Waller in denying an instructed verdict and new trial, with respect to the damages involved for temporary repairs, said: (R. 1316, 189 F. (2d) 251.)

> ". . . It is conceded that the detour bridges were built to keep traffic open over the State and Federal highway, of which the damaged bridge was a part. The trial judge, in sustaining the motion to strike this defense, was of the opinion that a failure to consider the cost of constructing the temporary bridges as a necessary part of the overall construction cost of the repairs of the permanent bridge would 'be to blindly ignore the importance of present day use of arterial highways'. We are impelled to the same view. Under the circumstances here present, where a permanent bridge, which the State has obligation to

[41] The pertinent portions of the lease purchase agreement are as follows: (R. 23.)

> "2. The Department will at all times during the continuance of this agreement, maintain the bridge and approaches in good repair and in sound operating condition, and will make all necessary repairs, renewals and replacements.
>
> "4. The Department will at all times during the continuance of this agreement, operate said bridge free of tolls as a part of the State road system."

maintain and keep open to accommodate a heavy flow of traffic, is damaged the cost of constructing temporary facilities essential to maintain the regular flow of traffic is so directly related to the injury to the bridge and such a well understood necessary consequence of such injury that such expense should be deemed legally a part of the damages sustained by the injury to the permanent bridge. So closely related are the repairs to the permanent bridge and the necessity for maintaining the traffic artery which it affords that we think the expense here in question constitutes 'actual damage to the highway' within the fair intent and meaning of the Florida Statute. Actual damages are compensatory damages expenses which naturally and reasonably follow from an injury to property are proper items of recovery. In recognition of this, Florida Courts permit recovery of the use value of automobiles while waiting repair, and the right to recover the rental expense for an automobile necessary to replace one negligently damaged is well recognized."

The Court further said: (R. 1317.)

". . . We have found no Florida decision which construes the Florida Statute to exclude the recovery of consequential damages. It is our independent opinion that a fair and reasonable construction of the Statute furnishes a basis for the recovery now involved since the damages claimed are the natural and reasonable consequence of the injury to the bridge, the highway."

There is no dispute that Pensacola Bay Bridge is a part of the State road system and is a Federal Aid road

designated U. S. No. 98 (R. 160). A casual examination of plaintiff's Exhibit 30 (original deposited with CCA) an official State highway map, discloses the importance of this particular highway.

Exclusive of Statutes, the State of Florida has an inherent right to recover damages for all injuries sustained by it and the legislative acts in question have merely designated the State Road Department, the agency charged with the construction and maintenance of the highways, as the appropriate agency to bring an action and recover the damages for injury to the highways.[42]

The Legislature in authorizing the State Road Department to sue for damages to State highways, did not create a cause of action nor intend to limit or restrict it to recovery of certain specified damages, leaving a right of recovery for other damages remaining in the State itself.[43]

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[42] 59 C. J. Sec. 458, p. 299:

"Although the right to sue is sometimes expressly conferred by statute, it is well settled that, independently of any statutory provision therefor, a State may sue in its own Courts, either as sovereign, or by virtue of its rights as a political corporation. Also a State may sue in the Courts of a sister State, at least to enforce its rights as a corporation; and in the Federal Courts, apparently in its sovereign capacity as well as in its corporate capacity."

49 Am. Jur. Sec. 80, p. 292-295:

"A State as a political corporation, has the right, independent of any statutory provision, to institute a suit, in any of its courts, the courts of sister states, and the United States Courts, whether it is required by its pecuniary interest or the general public welfare. It possesses this right both in its sovereign capacity and by virtue of its corporate rights. . . ."

"A State may adopt any remedy or employ any legal measures which a private suitor may use, ..."

Georgia vs. Tennessee Copper Company, 27 S. Ct. 618, 206 U. S. 230, 51 L. Ed. 1038.

Georgia vs. Brailsford, 2 Dall. 402, 1 L. Ed. 433.

[43] Chap. 341.24, F. S. A. 1941, provides:

"The State Road Department shall maintain the State roads and protect and preserve the same from trespass and injury and prevent such use of, and traffic on, said roads as is or will

The adoption of the construction of the term "actual damages" as used in Chap. 341.24 F. S. A., relating to recovery by the State Road Department for injuries to State roads, in the manner contended for by petitioner, will do violence to the intent of the Legislature.

The term "actual damage" means substantial as distinguished from nominal damages,[44] compensatory as distinguished from punitive or exemplary damages,[45] and includes special as well as general damages.[46] "Actual damages" are those which the injured party is entitled to recover for the wrongs received and injuries done when none was intended,[47] and in its literal sense means such

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be liable to endanger the comfort and safety of public travel on said roads. Said Department shall make and maintain said roads safe for the use of sober, lawabiding citizens who desire to travel over the same.

"*Any person shall be civilly liable to the Department for the actual damage to the highway by reason of his wrongful act,* which damage may be recovered by suit. . . ."

Chap. 320.54 (6), F. S. A. 1941, provides:

"Whoever damages any State road by any trespass on, unlawful use of, or traffic over such road, shall be civilly liable for the amount of such damage, which amount may be recovered at the suit of the State Road Department. . . ."

[44] *Blow vs. Joyner*, 156 N. C. 140; 72 S. E. 319.

[45] *Green vs. Western Union Tel. Co.*, 136 N. C. 489; 41 S. E. 165. *Comer vs Age-Herald Publishing Co.*, 151 Ala. 613, 44 So. 673. In the case of Jeffords vs. Florence County, 165 S. C. 15, 162 S. E. 574 (576), the Court said:

"Appellant contends that the evidence excluded was competent because the statute under which the action was brought limits plaintiff's recovery to actual damages, and that, by deducting the amount paid by the insurance company, the amount of actual damages suffered by the plaintiff is ascertained. We do not think the term 'actual damages' employed by the statute may be construed in that sense. We think it was used in contra distinction to punitive damages."

[46] *Winans vs. Chapman*, 104 Kan. 664, 180 Pac. 266; *Washer vs. Bank of America*, 123 P. (2d) 575. *Words and Phrases*, Perm. Ed. Vol. 2, p. 234.

[47] *Ross vs. Leggett*, 61 Mich. 445, 28 N. W. 695.

damages as could actually be shown to have been suffered.[48]

The Court is requested to note that notwithstanding the fact that the petitioner refers to Chap. 320.54 (6), F. S. A. on page 4 of its brief, no effort is made under Question Two to discuss, distinguish or otherwise indicate the non-applicability of that statute. This statute makes any person who injures a bridge by trespass liable "for the amount of such damage", and directs the State Road Department to institute suit therefor. The right of the State Road Department to institute this suit and collect damages does not depend solely upon Chap. 341.24 FSA which contains the term "actual damage" but the damages may be recovered under the provisions of Chap. 320.54(6) F. S. A.

The word "trespass" is not confined in its meaning to an intentional injury inflicted by force but embraces a tort negligently committed.[49] "Trespass" may be generally said to be an injury to the property of another by one who has no authority or right whatever to do so,[50] and gen ally includes any transgressions against the laws [51] or any wrongful act that causes damages to another [52] and in statutory

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[48] *Western Union vs. Lawson*, 66 Kan. 660; 72 Pac. 283, 284; *State ex rel St. Joseph's Belt Ry. Co. vs. Shaim*, 341 Mo. 733, 108 S. W. (2d) 351, 356.

In the case of Cooper vs. S. C. Highway Dept., 183 S. C. 155, 190 S. E. 499, text 505, the Court said:

"It will be noted that the act limits the recovery to the actual amount which the person suing has suffered by injury to his person or damage to his property . . . It seems clear that, when the Legislature used the words 'actual damages' it used them in their literal sense and meant such damage as could actually be shown to have been suffered."

[49] *Rotan vs. Maedgen*, 24 Tex. Civ. App. 558, 59 S. W. 585. *Wettermark vs. Campbell*, 93 Tex. 517, 56 S. W. 331.

[50] *King Lbr. & Mfg. Co. vs. State*, 106 Fla. 680, 143 So. 616.

[51] *Grunson vs. State*, 89 Ind. 533, 47 Am. Rep. 178.

[52] *O'Brien vs. Delta Corp.*, 188 La. 911, 178 So. 489.

construction the words "trespass" and "tort" are generally treated as interchangeable terms.[53]

The petitioner seeks to restrict the plain meaning of the term "actual damages" as used in Chapter 341.24 F. S. A. but the meaning of any word or phrase used in the statute must be determined from the purpose for which the statute was enacted, and these statutes are intended to designate an agency to recover damages sustained by any State bridge.[54]

Even when a strict construction is required (which is not the case here), a statute may not be extended by implication nor inference but the construction should not be unduly technical, arbitrary, severe, artificial or narrow; [55]

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[53] *So. Ry. Co. vs. City of Rome*, 179 Ga. 449, 176 S. E. 7. *Hackensack Trust Co. vs. Vandenberg*, 88 N. J. L. 518, 97 Atl. 148.

[54] *Peninsular Indus. Ins. Co. vs. State*, 55 So. 398, 61 Fla. 376, text 378:

"The language used in a statute should be construed as an entirety and with reference to the purpose of the law as shown by all enactments on the subject; and the meaning of words is ascertained by the connection in which they are used and the evident intent disclosed by all of the provisions on the same subject. Particular reference to the general purpose designed to be accomplished."

In 59 C. J. Title Statutes, Section 571, page 961, the rule is set forth as follows:

"In construing a statute to give effect to the intent or purpose of the Legislature, the object of the statute must be kept in mind that such construction placed upon it as will, if possible, effect its purpose. . . . To this end it should be given a reasonable or liberal construction; and if susceptible of more than one construction, it must be given that which will best effect its purpose rather than one which would defeat it, even though such construction is not within the strict literal interpretation of the statute and even though both are equally reasonable. Where there is no valid reason for one of two constructions, the one for which there is no reason should be adopted; . . ."

[55] *Fasulo vs. U. S.*, 272 U. S. 620, 47 S. Ct. 200, 71 L. Ed. 443, 445. 50 Am. Jur. (Sec. 389) 410;

In the case of *Donnelly v. United States, 276 U. S. 505, 48 S. Ct. 400, 72 L. Ed. 676*, the court said:

". . . Taken according to their ordinary meaning, the words used are sufficient to make the facts alleged and found a punishable offense. The rule that penal statutes are to be strictly con-

and the words used need not be given their narrowest meaning, or the less extended of two meanings, or indeed any meaning other than their full meaning, where such construction is in harmony with the context.[56]

The petitioner has cited the same three cases which were cited to the trial judges and Circuit Court of Appeals construing specific statutes of certain States with respect to claims for damages to bridges. In each instance the Court rejected the applicability of these cases.

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strued in favor of persons accused is not violated by allowing *the language to have its full meaning where that construction is in harmony with the context and supports the policy and purposes of the enactment.*" (Italics by counsel.)

In the case of *Gooch v. United States, 297 U. S. 124, 56 S. Ct. 395, 80 L. Ed. 522*, the court said:

". . . And while penal statutes are narrowly constructed, this does not require rejection of that sense of the words which best harmonizes with the context and the end in view."

In the case of *Sarlls v. United States, 38 L. Ed. 556, 14 S. Ct. 720, 152 U. S. 570, 574*, the court said:

". . . The purpose of such a statute is to notify the public of the legislative intent, not to furnish scientific definitions. That intent is, in most cases, to be found by giving to the words the meaning in which they are used in ordinary speech."

[56] In the case of *United States v. Giles, 300 U. S. 41, 57 S. Ct. 340, rehearing denied in 300 U. S. 687, 81 L. Ed. 888, 57 S. Ct. 505, 81 L. Ed. 493, 497*, the court said:

"The rule often announced, that criminal statutes must be *strictly construed, does not require that the words of an enactment be given their narrowest meaning* or that the lawmaker's evident intent be disregarded." (Italics by counsel.)

In the case of *Sacramento Nav. Co. v. Salz, 273 U. S. 326, 47 S. Ct. 368, 71 L. Ed. 663 at 666*, the court said:

"It is said that the Harter Act is to be strictly construed. Even so, *the rule of strict construction is not violated by permitting the words of a statute to have their full meaning, or the more extended of two meanings.* The words are not to be bent one way or the other, but to be taken in the sense which will best manifest the legislative intent." (Italics by counsel.)

In the case of *Ash Sheep Co. v. United States, 252 U. S. 159, 169, 64 L. Ed. 507, 40 S. Ct. 241*, the court said:

". . . and since the courts and the Department of Justice for almost fifty years have interpreted the section as applicable to 'sheep', we accept this as the intended meaning of the section.

. . . .

" 'The admitted rule that penal statutes are to be strictly construed, *is not violated by allowing their* words to have full meaning, or even the more *extended of two meanings, where such construction best harmonizes with the context*, and most fully promotes the policy and objects of the legislature.' " (Italics by counsel.)

In the case of *State Highway Commission vs. American Mutual Liability Insurance Company,* 146 Kan. 187, 70 P. (2d) 20, the Court was considering a statute which created a new cause of action (where none previously existed) for damage to bridges because of overloading in violation of the statute. It is well settled that a statute creating a new cause of action where none previously existed is strictly construed. The common law right of action for negligence was not involved in the case.

In the case of *Shell Oil Company vs. Jackson County,* (Texas Courts Civil Appeals), 193 S. W. (2d) 268, a suit was instituted under a statute creating a cause of action for overloading and providing that parties should be liable for "all damages which said . . . bridge may sustain as a result of negligence." The Court held that the suit was brought solely under a statute and that the statute did not provide for consequential damages.

In the case of *State vs. F. W. Fitch Company,* 236 Ia. 208, 17 N. W. (2d) 380, a suit was instituted by a State Highway Commission that was in charge of construction and maintenance of a bridge *owned* by the State; the Commission had no power to sue generally and its authority to sue was claimed to stem solely from a statute that provides if injury resulted to a highway "by illegal operation" and loads "in excess of maximum weights" "such damage may be recovered by the authorities in control of such highway . . .". The complaint was based on a claim of "negligence" which the Court held was not synonymous with "illegal" and therefore the complaint was dismissed as the Highway Commission had no authori-

ty to sue. The comments of the Court on the right to recover for a detour were *dicta* and the case did not hold that such damages could not be recovered in a common law action as distinguished from a statutory action.

The Federal Tort Claims Act provides that the United States shall be liable under circumstances where liability is imposed upon an individual "in acordance with the law of the place where the act or omission occurred". The Supreme Court of Florida has held that a party is liable in tort for all of the consequences that reasonably and naturally flow from or follow its wrongful act, whether these consequences were actually contemplated or not. The tortuous act being established, the liability extends to all of the consequences that naturally, proximately, and reasonably follow or result from such act[57] and a plaintiff suing for damages to a truck could recover as consequential damages his expenditure for rent or hire of a truck or other vehicle suitable to perform services usually performed by the damaged truck.[58]

Petitioner next contends that the cost of the detour bridges was too remote to be allowed as an item of damage. The facts in the records speak for themselves. A bridge constituting an integral part of an arterial State and Federal Aid Highway system was rendered unusable by negligence of the defendant. It took almost a year to repair the bridge so it could be used again. The stipulation between the parties established the cost of the detour bridges. Exhibit 30, a map of the State highways,

[57] *Briggs vs. Brown*, 55 Fla. 417, 46 So. 325.
[58] *Mortellaro & Co. vs. A. C. L. Ry. Co.*, 91 Fla. 230, 107 So. 528. Other cases to the same effect were cited by the Circuit Court of Appeals (R. 1316).

indicates the importance of this bridge. The map also indicates the fact that suitable alternate routes were not available. There was no showing of extravagance and no such contention made either in the lower court or in the Circuit Court of Appeals and the case cited by counsel, *Brooklyn Eastern District Terminal vs. U. S.*, 287 U. S. 170, 174, has no applicability to this case.

The next contention made by the petitioner is to the effect that as the plaintiff had a duty to keep the highways in operation, such duty was an exercise of a sovereign function, and the plaintiff could not therefore recover damages for doing its duty.

To follow this sort of argument to a logical conclusion, if petitioner's contention is correct, it would be a perfect defense to the suit for damages to the permanent structure because the State Highway Department has a statutory duty as well as the obligation contained in its lease, to make permanent repairs and replacements and maintain the bridge in a usuable, satisfactory and operating condition.

In other words, since the State has a duty by law with respect to the highways, its property can be damaged with impunity.

Common sense indicates that the State Highway Department is charged by law with maintaining the highways in a usable condition for the traffic passing thereon; that bridges costing millions of dollars shall not be permitted to lie idle because of damages inflicted thereto, and it

appears that Chapter 341.24 FSA makes "the comfort and safety" of the public who travel on said roads and "the law-abiding citizens who desire to travel over the same" subjects for primary consideration of the Road Department, laying down broad duties with reference thereto; that such a program does not contemplate that the public shall be inconvenienced, injured and discomforted by the disruption of traffic until repairs can be made to a permanent structure (which will require almost one year for accomplishment) and this is particularly true where a tort feasor whose wrongful act caused the damage claims that the damages should be minimized at the expense of public comfort, convenience and safety.

Petitioner seeks to invoke the jurisdiction of this Court, by reason of alleged conflict with a decision in the case of *The Manhattan*, 10 F. Sup. 45 (E. D. Pa.), Aff. 85 F. (2d) 427, 429. Even a casual examination of the case will disclose the fallacy of such contention. In that case, a dredge owned by the government was damaged and sunk in a channel, the government claimed damages for the injury to the vessel and also the cost of removing the vessel from the channel as an obstruction to navigation which under the law it had a governmental duty to do.

The statute required the government to remove wrecked vessels from navigable waters in event the owner has abandoned the wreck, but the government could claim the wreck or a lien against it for its expenditures. The Court held that since it was the duty of the government to remove privately owned wrecks as well as government owned wrecks, it was not an element of damage. This was

the basis for the decision and this distinguishes it from the case at bar. Consider the case of a privately owned bridge damaged or destroyed by a tort feasor. The State Road Department would have no obligation by law to make permanent repairs or construct detour bridges to maintain the flow of traffic. The duty of the United States was to remove wrecks of private owners as well as government vessels but the duty of the State Road Department relates only to a publicly owned bridge. There is no conflict between the decisions.

The States own property and perform many duties by law. To hold that a State cannot recover for torts because it has a legal duty to perform in connection with the subject matter of the case would be a radical departure from the accepted principles of law.

Notwithstanding the legal duty, the State Road Department had a contractual duty to Escambia County to maintain the bridge in an operating condition.

THIRD QUESTION.

WHETHER THE FAILURE OF AN INSURER-PARTIAL SUBROGEE, HAVING A CLAIM AGAINST THE UNITED STATES UNDER THE FEDERAL TORT CLAIMS ACT, TO INSTITUTE SUIT OR JOIN IN AN EXISTING SUIT BY THE INSURED WITHIN THE STATUTORY PERIOD OF LIMITATIONS BARS THE CLAIM TO THE EXTENT OF THE SUBROGEE'S INTEREST.

The petitioner, with respect to this question, has exhibited the most extraordinary legal gymnastics and tech-

nical contortions. In each court and each time this question has been presented, the petitioner has changed its position in an effort to succeed.

Like the Second Question, this question has been submitted on three separate occasions and was rejected on each occasion.

The complaint filed in this cause (R. 35, 57, 58) disclosed that the State Road Department had instituted suit and claimed as damages the sum of $273,521.42 for injuries to the permanent structure of the bridge and $146,713.90 for the construction of temporary detour bridges around the demolished and damaged portions of the permanent structure, rendered unsafe for travel. Aetna Insurance Company (hereinafter called Aetna) had reimbursed the State Road Department, partially, for the damage, by paying to it $215,000.00 on account of the physical damage to the permanent structure of the bridge. (R. 61.) The trial judge awarded a total of $243,941.04 as damages to the permanent structure and $128,426.39 for the construction and removal of the detour bridges.

Suit was instituted by the State Road Department for the *entire damage* above set forth and subsequently Aetna was joined as a party plaintiff pursuant to the motion of the defendant.

Petitioner seeks a technical construction of Federal Rule 17(a) which will bring about a result exactly opposite to the announced intention of the Court, that such rules were adopted to secure the just, speedy and inexpensive determination of every action.[59]

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[59] Federal Rules 1 provides:
"... they shall be construed to secure the just, speedy, and inexpensive determination of every action."

It is believed that a chronological statement of events will be helpful in considering the opinions of the District Judge and the Circuit Court of Appeals:

1. On *May 20, 1946*, the collision occurred.

2. On *August 2, 1946*, the Federal Tort Claims Act became effective, requiring suits to be brought at the latest before August 2, 1947.

3. On *December 5, 1946*, the State Road Department instituted suit *for the entire damages* and a judgment was rendered in this case for substantially that amount.

4. On *May 20, 1947*, (more than two months prior to the *then* existing time limitation for suits) the defendant filed its answer and although the defendant *had full knowledge of the payment by Aetna to the State Road Department* [60] *it made no objection* and *filed no defense* that the State Road Department was not entitled to sue for the benefit of Aetna and made no motion to require the joinder of Aetna.

5. On *November 12, 1947*, the complaint was amended to eliminate surplusage but in no way changed the allegation with respect to the damage or the amount claimed. (R. 53.)

6. On *December 22, 1947*, the defendants filed an answer to the amended complaint and for the first time contended that the State Road Department could not recover the sum which it had received from Aetna, alleging

[60] (R. 62, 88, 115, 119, 121.)

that such a suit must be brought (R. 76) "by the said insurance company *in the name of the said assured for the use and benefit of said insurance company.* . . ."

7. On *April 17, 1948* (R. 91), the Court struck the above defense but prior to striking the same, offered to treat such defense as a motion to require the joinder of Aetna Insurance Company if counsel for the defendant so desired (R. 123) but counsel for the defendant refused to so request the Court.

8. On *June 19, 1948*, the Admiralty Extension Act of 1948 (46 USC 740) became effective but by the terms of said Act, it was not applicable in this cause as it excluded all causes of action where suit has been "hitherto filed under the Tort Claims Act".

9. On *September 24, 1948* (R. 99), the defendant filed a motion to require the joinder of Aetna Insurance Company and Petitioner made representations which are most material in this cause.[61]

10. On *September 24, 1948*, (R. 103) the Court held that Aetna was "subrogated to a portion of any recovery from the defendant"; and ordered its joinder "as a party plaintiff in this cause so that all parties for whose benefit the action is being prosecuted shall appear of record as parties in this suit" (R. 103) and that "neither the State Road Department . . ." nor Aetna "will be prejudiced in any way if said insurance company is made a party herein".

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[61] Fully set forth in footnote on page 99 of this brief.

11. On *September 28, 1948*, Aetna joined as plaintiff "pursuant to the order of Court . . . as a party for whose benefit the action is being prosecuted by the plaintiff, State Road Department . . ." (R. 105.)

12. On *December 2, 1948*, the defendant by its Seventeenth Defense contended that Aetna could not recover "because it did not institute suit, or join in this suit, against the defendant, within one year after August 2, 1946 . . ." but no claim of the applicability of the Admiralty Extension Act was made at that time.

13. On *April 4, 1949*, the Court struck the Seventeenth Defense.

14. On *April 25, 1949*, the Federal Tort Claims Act was amended so that suits could be instituted at any time prior to April 25, 1950.[62]

15. On *July 11, 1949*, the case was tried and the Judge rendered his opinion and findings on July 31, 1949.

Points to be argued under Questions Three.

1. The State Road Department is required by statute to institute suits for tortious injuries to public highways and bridges[63] and under the provisions of Federal Rule

[62] Title 28, U. S. C., Sec. 2401(b) (Amended Act effective April 25, 1949) provides as follows:

"A tort claim against the United States shall be forever barred unless action is begun within two years after such claim accrues or within one year after date of enactment of this amendatory sentence whichever is later. . . ."

[63] Chapter 320.54(6) F. S. A. 1941 see Page 74 footnote. Chapter 341.24 F. S. A. 1941 see Page 75 footnote.

17(a) the State Road Department is the only necessary or indispensable party plaintiff and the persons for whose benefit the suit is instituted need not be joined as a plaintiff.

2. Any non-joinder of Aetna, prior to August 2, 1947, was waived by the failure of the defendant, who had full knowledge of the payment made by the insurance company, to interpose a seasonable objection or motion to require such joinder.

3. It was not essential under Rule 17(a), but was appropriate if the defendant so desired, that Aetna be made a party to the suit and having been so made a party prior to the trial which occurred on July 11, 1949, any question with respect to the right of Aetna to participate in the proceeds of the judgment was rendered moot by the adoption of the amendment to the Federal Tort Claims Act (effective April 25, 1949) which permitted the filing of claims at any time before April 25, 1950.

Judge DeVane in striking the Twelfth Defense (R. 73) said:

> "The Twelfth Defense alleges . . . that under the law of Florida, the insurance company became subrogated to the claim of the insured to the extent of said $215,000.00 and that any action to recover said sum 'must be brought by the insurance company *in the name of the insured*, for the use and benefit of' said insurance company; that plaintiff did not allege that the sum of $215,000.00 'is for the use and benefit of

said insurance company and that plaintiff cannot recover said amount in the absence of such allegation . . .'.

"Rule 17(a), Federal Rules of Civil Procedure provides that a party authorized by statute *may sue in his own name without joining with him the party for whose benefit the action is brought.*"

"Section 320.54 (6) and 341.24, F. S. A. 1941[64] authorized the State Road Department to sue for the recovery of damages to a State highway by reason of the wrongful act of another. The Court holds that under these sections of the Florida law and Rule 17(a), Florida Rules of Civil Procedure, the Twelfth Defense should be and it will be stricken." (Italics by counsel.)[65]

It is a general rule of law that when the Legislative branch of government has declared that certain classes of cases shall be prosecuted in the name of the State by a designated agency, officer or person, such cases must be

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[64] These two statutes are quoted in full on page 74 & 75 of this brief.

[65] Rule 17(a) provides:

"Every action shall be prosecuted in the name of the real party in interest but an executor, administrator, guardian, trustee of an express trust, a party with whom or in whose name a contract has been made for the benefit of another, *or a party authorized by statute* may *sue in his own name without joining with him the party for whose benefit the action is brought;* and when a statute of the United States so provides an action for the use or benefit of another shall be brought in the name of the U. S." (Italics by counsel.)

Judge Hutcheson in the case of *U. S. vs. Hill*, 171 F. 2d 404, txt. 408, in a dissenting opinion, said:

"I know the purpose of the new rules of Federal procedure was, and I thought their effect had been, to do away with such formal shadow-boxing by coming at once to grips with the substance. . . ."

instituted by the agency, officer or person designated and cannot be maintained by any other person;[66] that the person or agency so designated by law must commence and maintain such action even though such person may not be a real party in interest.

In the case of *State ex rel Murray*, for use and benefit of *Sapulpa State Bank v. Pure Oil Co.*, 169 Okla. 507, 37 Pac. 2d 608, the Court said: (text 610.)

> "Since the state is the proper party plaintiff by virtue of the above statute, it may maintain the action, regardless of whether it is the real party in interest or merely a nominal plaintiff for the use and benefit of depositors and creditors. An action may be maintained by one expressly authorized by statute, even though that person is not in fact the real party in interest."

The Court further said:

> "It is the general rule of law, that, when the legislative branch of the government has declared that certain classes of cases shall be prosecuted in the name of the State by designated person or officers, such cases must be maintained by the person or officer designated and cannot be maintained by any other

[66] In the case of *Township of Denver vs. White R. Log & Booming Co.*, 51 Mich. 472, 16 N. W. 817 (Syl.):

"The Legislature has power to direct what officers shall bring any claims of public actions. . . ."

In the case of *Hunt vs. State*, 201 N. C. 37, 158 S. E. 703, txt. 704:

". . . When a statute names a person to receive funds, and authorizes him to sue therefor, no one but the person so designated has the right to litigate the matter."

To the same effect:

Romero vs. A. T. & S. F. Ry. Co., 111 N. Mex. 679, 72 P. 37.
Sup. Min. Co. vs. Mo. Pac. Ry. Co., 45 S. W. 2d 912.

person or officer. Commonwealth v. Helm, 163 Ky. 69, 173 SW 389; 59 C. J. 322. The necessity or orderly and harmonious government demands that the rule be observed. . . ."

The reason for this rule is readily apparent, for when damage is done to public property, appropriate public officers should institute suit for redress and should control all the legal proceedings relating thereto and this is particularly true when the insurance paid to the State as a result of the injury, does not fully cover the damage or injury sustained by the State. The State, by retaining control, can prevent proceedings from being conducted in a manner which would conflict with the best interests of the public and the State, even though such action might be most beneficial to the subrogee.

Judge DeVane held that Aetna became subrogated to the rights of the State and, therefore by operation of law, Aetna became entitled to participate in the proceeds of any judgment, *if and when collected* by the State Road Department. The United States was not then and is not now concerned with the distribution of the funds when recovered, and if the State Road Department had recovered the entire amount in a suit in which Aetna was not a party, the recovery would have been impressed with a trust for the insurer to the amount to which he was entitled by the principles of subrogation [67] and Aetna

[67] Vol. 3, Moore's Federal Practice (2d Ed.) p. 1348, sums up the situation as follows:

"When the insurer has paid less than the full loss, and is subrogated to only a part of the claim, there has been more difficulty. Here, too, though it seems there is no logical basis for a distinction between partial subrogation and partial assignment. Assume in this case that the insurer satisfies his liability to the insured, but the insured sues and recovers his entire loss. The recovery is impressed with a trust for the insurer to the amount to which he was entitled by the principles of subrogation. . . ."

could have required the Trustee to account for the sums of money recovered by it for the benefit of Aetna.[68]

Any non-joinder of Aetna, prior to August 2, 1947, was waived by the failure of the defendant, who had full knowledge of the payment made by Aetna, to interpose a seasonable objection or motion, to require such joinder.

The Twelfth Defense did not deny that the State Road Department was a proper party to bring the suit as plaintiff, but it merely claimed in its Twelfth Defense, that the pleadings should disclose that the suit was in part for the benefit of Aetna. The simple remedy to compel this by motion was available to the defendant, but no such action was taken by it.

An examination of the chronology of events on page 85 of this brief will disclose that the petitioner was playing hide-and-seek with the question here involved.

It is apparent that the defendant had all of the facts necessary to put it on notice that Aetna had made the payment to the State Road Department, and to require the joinder of Aetna if that was considered necessary, but notwithstanding this, it took no such action, but delayed

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[68] *Doleman vs. Levine*, 295 U. S. 221, 55 S. Ct. 741, 76 L. Ed. 1402, text 1406:

"The right of the employer to reimbursement from the recovery is derived from his subrogation . . . He is in the position of a partial assignee of the chose in action, and as such *is entitled to his share of the proceeds of the action when recovered*, and may secure their recovery by resort to equity, in a suit joining proper parties to compel action by the legal owner and appropriate distribution of the proceeds. See Peugh vs. Porter, 112 U. S. 737, 742; 28 L. Ed. 859, 860; 5 S. Ct. 361; Fourth Street National Bank vs. Yardley, 165 U. S. 634, 644; 41 L. Ed. 855, 861; 17 S. Ct. 439; Aetna L. Ins. Co. vs. Moses, supra (287 U. S. 542, note 3; 77 L. Ed. 483; 53 S. Ct. 231; 88 A. L. R. 647)." (Italics by counsel.)

the raising of the question until such time as it felt limitations would bar the action, and it then filed a pleading which did not attempt to prevent the entire recovery, but merely to reduce the amount of damages which could be recovered so as to eliminate any payments received by the State Road Department from Aetna.

The Federal Rules of Civil Procedure classify parties under Rule 19 (3 Moore's Federal Practice (2d Ed.) 2103) as follows:

> "(1) Formal or nominal; (2) proper; (3) necessary, or, more accurately speaking, conditionally necessary; and (4) indispensible."

The Circuit Court of Appeals found that this was merely a question of parties which in no way affected the justice of the cause and the plaintiffs should recover the entire damage. (R. 1314):

> "In brief, the contention is that since there were two 'real parties in interest' and only one of them filed a timely suit the other is barred. Thus to support its position it was necessary for the appellant to bring into the litigation the additional 'real party in interest' and assign to it an independent claim in order to invoke the bar of the Federal Tort Claims Act. Since the Road Department had not been fully reimbursed for its damages even to the main bridge structure, it was in any event entitled to assert a claim and, in fact, had done so—prosecuting suit for the full amount. In these circumstances, the question could in no event be broader than one of proper parties. The claim had been timely asserted. The determination of whether other additional parties

were entitled or indeed required to join in the suit was a matter distinct from the question of whether an action by one party ,likewise entitled to sue, had been begun within the permitted time. In the present case, there was only one foundation claim. That was for the damage to the bridge. This was the cause of action. The defendant had the right to bring in the subrogee as additional party, but when brought in the subrogee had an equitable right to reimbursement, which could be enforced only by establishing the same claim, or cause of action, of the Road Department. This had been timely filed, and was a sufficient and timely assertion of the claim for the entire damages. It is therefore clear that the fact that the subrogee was entitled to participate in the proceeds of the judgment when recovered furnishes no valid ground for adjudging this amount of the total recovery barred by the provisions of the statute."

The decision in the case of *United States vs. Aetna Casualty & Surety Company*, 338 U. S. 366, 7 S. Ct. 207, 94 L. Ed. 171, supports the decision of the Circuit Court of Appeals in this case, holding that if an insurance company "has paid only part of the loss, but the insured and insurer (and other insurers, if any, have also paid a portion of the loss) have substantive rights against the tort feasor, this qualifies them as real parties in interest". The Court further found (text 185):

> "Although either party may sue, the United States, upon timely motion, may compel their joinder. Delaware County v. Diebold Safe & Lock Co. 133 US 473, 488, 33 L. Ed. 674, 680, 10 S. Ct. 399 (1890) (applying a state code under the Conformity Act). 3 Moore's Federal Practice 2nd ed p. 1348. Both are 'necessary'

parties. Rule 19(b), Federal Rules of Civil Procedure."

At the outset it should be noted that the Court *did not* hold the insurance company or the insured to be an *"indispensible party"*. The Court *did not* hold that the insured cannot bring an action and recover the entire amount, thereby becoming trustee for the insurance company. The Court *did hold* that the United States upon timely motion can compel the joinder of the insurance company and also that "additional parties may be added at any stage of the proceedings, on motion of the United States, upon such terms as may be just."

The injured party may sue for the entire damages sustained notwithstanding the fact that an insurance company may have paid him a partial amount of his loss or the insured and insurance company may jointly institute such action [69] but if the defendant in a suit by the insured

[69] In the case of *National Garment Co. v. N. Y. C. & St. L. R. Co.*, 173 Fed. (2d) 32, (8th CCA) (text 34), the court said:

"Rule 17(a) of the Rules of Civil Procedure, 28 U. S. C. A., requires that every action shall be prosecuted in the name of the real party in interest. As the case now stands, the plaintiff is alleging a loss in excess of the amount paid by the insurer. The rule is that, in the absence of timely objection on the part of the defendant, the party suffering the loss may maintain an action for the recovery of the whole loss against the party primarily liable, although the plaintiff has been indemnified for part of his loss and the indemnifier, to the extent of the payment made, has been subrogated to the plaintiff's rights against the person primarily liable. (Citing cases.) In this situation there are two real parties in interest—the insurer to the extent of its payment and the insured to the extent of the difference between the payment received from the insurer and the whole loss. In the absence of objection either may maintain an action against the person primarily liable, the insurer to the extent of its payment, the insured to the extent of the whole loss. The rule against splitting a cause of action is for the benefit of the defendant and may be waived. Capital Fire Ins. Co. v. Langhorne, 8 Cir., 146 F. 2d 237, 243. On objection by the defendant, the absent party should be made a party plaintiff. Where the action is by the insured

alone, does not interpose timely objection or motion for joinder, then the right of requiring the joinder of the defendant of an additional party is waived.[70]

As the question involved was simply one of parties and as Aetna became a party to the suit in order that all persons for whom the suit had been instituted would be bound by the judgment, the petitioner should not now complain of such joinder since it was induced by its own action.

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for the whole loss, the defendant not objecting, the recovery is impressed with a trust for the insurer to the amount to which it is entitled by subrogation. See 3 Moore's Federal Practice, 2d Ed., para. 17.09, pp. 1348, 1349."

3 Moore's Fed. Prac. (2d Ed.) 1350:

"If it has become subrogated to only a part of the claim, the injured party can sue to his own use and to the use of the subrogee, or the injured party and subrogee may join as plaintiffs. And, indeed, the United States, on timely objection should be able to require that all persons having an interest in the claim be before the Court."

[70] 3 Moore's Fed. Prac. (2d Ed.) 1344:

". . . But since the requirement of joinder is solely for the protection of the debtor, it should be imposed only upon his insistence, and failure of the debtor to make a seasonable objection to the non-joinder of the assignor would result in a waiver of it. This result has been reached by the Courts upon a realization that since the partial assignee is a real party in interest, the non-joinder of the assignor is only a defect of want of parties that may be waived by the failure to object. The restatement of contracts apparently supports this view."

3 Moore's Fed. Prac. (2d Ed.) 1348:

"The insurer, therefore, owned that portion of the substantive right and the insured owned the remainder. There are two real parties in interest. Both may sue. But, as in the case of partial assignment, if the defendant makes a timely objection, the joinder of the insurer and the insured should be compelled. This has been the result reached by many courts. . . . Several courts have properly held that since the partial subrogee is a real party in interest, a suit by him alone states the cause of action, the only defect being one of parties which is waived unless seasonable objection is made. . . ."

39 Am. Jur. 984:

"As a general rule, unless the defendant promptly raises the question of defect of parties in a manner pointed out by local practice for taking objections to defect of parties he is deemed to have waived the objection. It is ordinarily too late to plead non-joinder after issue is joined. . . . Under the code practice especially, the objections cannot be raised by motion for dismissal, for judgment on the pleadings, for direction of verdict or by objections to the evidence. This rule applies whether the case is founded ex contractu or ex delicto."

It was not essential under Rule 17(a), but was appropriate if the defendant so desired, that Aetna be made a party to the suit, and having been so made a party prior to the trial which occurred on July 11, 1949, any question with respect to the right of Aetna to participate in the proceeds of the judgment was rendered moot by the adoption of the amendment to the Federal Tort Claims Act on April 25, 1949, which permitted the filing of claims at any time before April 25, 1950.

An examination of the chronology of occurrences (p. ... of this brief), will disclose that suit was filed by the State Road Department for the entire claim prior to August 2, 1947; that two months prior to the effective date of the Admiralty Extension Act, the Court offered to treat the Twelfth Defense as a motion to require Aetna to join as a party plaintiff but the defendant declined the offer; that after the passage of the Admiralty Extension Act, the defendant by motion made certain representations upon which the Court acted and required Aetna to join; after Aetna joined, the defendant sought to eliminate from the damages sued for, the amount that Aetna had paid to the State Road Department that Aetna had not filed a suit by August 2, 1947. The Court struck this defense and shortly thereafter the Federal Tort Claims Act was amended to permit suits to be filed at any time prior to April 25, 1950. This Act was in effect when the case was tried on July 11, 1949. It is believed that counsel for both parties were so busy preparing for the trial of this case that they were totally ignorant of the passage of this amendment to the Tort Claims Act, and after the smoke of battle cleared away, the plaintiff happily and the defend-

ant sadly discovered that any question of limitations, however ill-founded, had been eliminated completely by this amendment.

The petitioner thereupon reversed the field, and contended before the Circuit Court of Appeals as follows:

That Aetna had filed no claim prior to August 2, 1947; that the Admiralty Extension Act had removed claims of this kind from the jurisdiction of the law side of the Federal Court and therefore the amendment to the Federal Tort Claims Act had no application to this case.

Thereupon, the plaintiffs directed attention to the inconsistent conduct of the defendant in obtaining upon its motion, an order of the Court requiring the joinder of Aetna, based upon the representations that the defendant was a proper and necessary party to the suit, which was brought under the Federal Tort Claims Act, and then contending that the Court had acted erroneously because actions of this character had been withdrawn from the law side of the Court and placed under the jurisdiction of the Admiralty Division.

While the actual terms of the Admiralty Extension Act constituted a full and complete answer to any such contention,[70a] it was considered proper to suggest that the doctrine of estoppel should be applied.

[70a] The *Admiralty Extension Act* of June 19, 1948, 46 U. S. S. Sec. 740, provides among other things, as follows:

". . . That as to any suit against the United States for damage or injury done or consummated on land by a vessel on navigable waters, the public vessels act or suits in admiralty act, as appropriate, shall constitute remedy for all causes of action arising after *June 19, 1948, and for all causes of action where suit has not been hitherto filed under the Federal Tort Claims Act.*" (Italics by counsel.)

The representations [71] and the conduct of the defendant have estopped it to contend that the rights of Aetna must be determined in Admiralty and cannot be adjudicated in this suit, as the defendant by its own motion caused an order to be entered requiring Aetna to join the suit.[71a]

It was clearly *not* the intention of Congress to withdraw from the jurisdiction of the law side of the court the right to hear and determine any controversy that was pending at the time of the passage of the Admiralty Extension Act. It was not the intention of Congress to create a multiplicity of suits by reason of the passage of the Admiralty Extension Act, nor to render ineffectual the provisions of the Federal Rules for Civil Procedure, which permit the joinder and addition of parties at any stage of a case so as to render full and complete justice in one cause.

The text writers generally agree that the Federal Tort Claims Act should be given a liberal and practical con-

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[71] (R. 99) Defendant's motion, in part, stated:

". . . Aetna . . . by paying the sum of $215,000.00 became subrogated to the right of the said insured to the extent of such payment. The insurance company has or claims a right to participate to the extent of $215,000 in any recovery from the defendant in this suit. . . . Under the law of the State of Florida, the plaintiff and its subrogee, Aetna, . . . are authorized to jointly sue the defendant to recover for the alleged damage to the bridge. Both the plaintiff and said insurance company should be joined as parties plaintiff in the prosecution of this suit in order that their respective rights, if any, *against the defendant and against each other can be settled in this one action*, thereby avoiding a multiplicity of suits, *and completely and finally adjudicating the rights of said insurance company, the plaintiff and the defendant in this suit.*"

Note by Counsel:

Under the laws of Florida, the subrogee was a proper but not a necessary or indispensable party. The cause of action in such a case is vested and owned by insured under substantive law of Florida, and the insured may sue for the entire amount of damage.

[71a] *Iselin, et al. vs. LaCoste, et al.*, 147 Fed. (2d) 791; *Wood vs. Franklin L. Ins. Co.* (5th CCA) 17 Fed. (2d) 80; *Bailey vs. Am. Tr. Co.*, 133 So. 331, 101 Fla. 42; *Kelly vs. Norwich F. Ins. Co.*, 82 Ia. 137, 47 N. W. 986.

struction [72] and the Supreme Court of the United States in the case of *United States vs. Aetna Casualty and Insurance Company, et al., supra,* has confirmed this interpretation.[73]

Summarizing, the record discloses that

1. At the time of the passage of the Admiralty Extension Act, there was pending in the District Court a case for the total amount of damage done to the Pensacola Bay Bridge;

2. That the case involved the same accident, the same defendant;

3. That the District Court had ruled that Aetna need not be joined as a party in order to permit the State Road Department to recover the entire damage;

4. That the rights of Aetna were not different from the rights of the State Road Department;

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[72] 3 Moore's Fed. Prac. (2d Ed.) 1349:

"The principles of subrogation, discussed above, should apply in suits against the United States under the Tort Claims Act. While it is true that the United States has waived its sovereign immunity to suit only to the extent stated in the Act, the legislation should be given a liberal and practical construction to carry out the purpose of relieving Congress from the onerous and time-consuming task of passing upon claims growing out of torts within the coverage of the Act, and Rule 17(a) should govern as to who is a real party in interest. . . ."

[73] 94 L. Ed. text 186:

"If Rev. Stat. 3477 is inapplicable, as we think it is clearly the case, these objections have no legal foundation upon which to rest. In argument before a member of District Courts and Courts of Appeals, the government relied upon the doctrine that statutes waiving sovereign immunity must be strictly construed. We think that the Congressional attitude in passing the Tort Claims Act is more accurately reflected by Judge Cardozer's statement in Anderson vs. John L. Hayes Construction Co., 243 N. Y. 140, 147, 153 N. E. 28: 'The exemption of the sovereign from suit involves hardship enough where consent has been withheld. We are not to add to its rigor by refinement of construction where consent has been announced'."

5. That Aetna at the motion of the defendant, was required to join and did join as a party plaintiff prior to April 25, 1950, the last date for filing under the amendment to the Federal Tort Claims Act.

6. That the decision in the pending case determined all of the issues that could be involved in any case where Aetna was the party;

7. That the rights of Aetna were not greater than but subordinate to the right of the State Road Department to recover against the United States;

8. It is not the intention of the lawmakers, as expressed in the statute, to require the institution of a suit in admiralty by a subrogee, when a suit at law involving the same question is pending between the same parties.

The petitioner contends that the case of *Yorkshire Ins. Co. vs. U. S.*, 171 F. (2d) 374 (CCA 3) is in conflict with the present case. A proper examination of the original record in the case will disclose that such contention is untenable. In the cited case, the Court said:

> "Whether the two insurance payments cover the entire loss we do not know and no allegation concerning that fact is found in the complaint of either of the appellants. The two insurance companies bring separate actions against the United States . . . claiming to be subrogated to the insured's claim against the United States for the damage done to the property."

An examination of the brief for respondents filed in the Supreme Court, indicates that the two claims covered the entire loss.[74]

In the case at bar, the record clearly disclosed that the entire damage to the bridge was being sued for.

In the case of *Yorkshire Ins. Co. vs. U. S., supra,* the Court further said (text 376):

> "It is, therefore, clear that the rule of one claim, one law suit, is for the benefit of the defendant, and he is the one who should make a timely claim to join the necessary parties. It is a right which may be waived by a defendant, and it has been so held in federal cases applying State procedural codes under the Conformity Act and by State Courts. The result has been approved by secondary authorities and its application urged under the Federal Rules. We think this view is sound and affords a defendant sufficient protection from the embarrassment of numerous law suits."
>
> "What the United States has thus presented, then, is not a defense upon the merits of the plaintiffs' claim but a procedural rule established for the convenience of it and other defendants similarly situated . . ."

So far, it cannot be denied that this case directly supports the decision in the case at bar. However, the peti-

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[74] The brief of Abraham Frankel, Esq. for respondents, states as follows: (P. 1.)

"The statement of facts presented by the petitioner is substantially correct, requiring only the following clarification. The total amount of the property damage loss caused by the fire is covered by the payments made by the respondents. It is not to be inferred, as intended by the United States, that outstanding claims exist in the insured or other persons with respect to the property damage loss."

tioner seeks to invoke the jurisdiction of this Court based upon the following statement:

> "It appears that a motion to add further parties was made and dismissed by the District Court for coming out of time."

The above is a mere factual statement and it is believed that the petitioner will obtain little comfort out of this statement when the record of the case is examined.

The record [75] does not contain the proposed amended complaint. The record and briefs in said case *do disclose that no error was assigned* on appeal with respect to the action of the District Court in denying the motion to permit the filing of the amended complaint. There is no joinder in the appeal by any of the parties who may have been named in the amended complaint. Therefore, neither the appellants nor any one else presented a question as to the propriety of the ruling of the District Court as it was not necessary for a decision in the case.

The comment of the Court based upon something that does not appear of record in the case and upon a matter not before the Court cannot be considered as an authoritative decision which will create a conflict with any other decision of a Circuit Court of Appeals.

The motion in the above cited case, whatever it may have contained, was made by the plaintiff.

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[75] The record in the 3rd CCA is also on file in the Supreme Court. *U. S. vs. Yorkshire Ins. Co.*, 338 U. S. 366; 7 S. Ct. 207; 94 L. Ed. 171.

The motion in the case at bar for the joinder of the parties was made by the defendant and it now complains because the Court granted its motion.

The motion was denied in the cited case after August 2, 1947 and before the effective date of the amendment to the Federal Tort Claims Act extending the time within which such suits could be filed to April 25th, 1950.

It, therefore, appears that the case is clearly distinguishable from the case at bar; that there is no decision, by the Third Circuit Court of Appeals upon matters which were properly before it, which conflicts with the decision in the case at bar and the decision supports, (instead of conflicting with) the decision in this case.

CONCLUSION.

Due consideration has been given to Supreme Court Rules 26 and 27 and an effort has been made to make this brief as concise as possible without omitting matters which are considered essential to a fair determination of the case. The record involved in this case consists of 3 volumes with a total 1336 pages and the law of the case is so involved with the facts and the procedural activities of the parties, that a further condensation could not be made without the hazard of omission of essential matters. It is our view, which we hope is correct, that more time of the appellate court will be consumed unnecessarily, if through a sketchy presentation of the plaintiff's case, a certiorari is granted, only to be found that a full and complete presentation of the plaintiff's case would have caused

the Court to deny the petition in the first instance. It is respectfully submitted:

1. That none of the Questions indicates any reason for the grant of a Writ of Certiorari under Supreme Court Rule 38:

(a) There has been no sanction by the Circuit Court of Appeals of a departure from the accepted and usual course of judicial proceedings and

(b) There are no conflicts between the decisions of the Fifth Circuit Court of Appeals in this case with any other Circuit Court of Appeals.

2. The findings of the Court as to the facts existing, and the overwhelming weight of the evidence disclosed by the record, permits no decision other than that of a judgment for the plaintiff.

3. Under the law of the State of Florida, consequential damages may be recovered in tort actions and, therefore, there is no merit to the contention that the damages for the detours should be eliminated.

4. At the time of the rendition of this judgment, all of the interested parties on both sides were parties to the suit, they had full opportunity to present the applicable law with respect to the appropriate parties and the right of recovery of consequential damages to the District Judge who settled the pleadings and the Circuit Judge who sat as trial judge. The parties had a full opportunity to present the case to the Circuit Court of Appeals and in each instance the contentions of the petitioner presented, were rejected.

It is respectfully submitted that the petition for writ of certiorari should be denied.

RICHARD W. ERVIN, JR.,
Attorney General of Florida,
T. PAINE KELLY,
Assistant Attorney General,
JOHN W. McWHIRTER,
Attorney for State Road
Department,

.....,
J. McHENRY JONES,
P. O. Box 732,
Pensacola, Florida,
Attorney for Respondents.

HERBERT LATHAM,
JOE J. HARRELL,
Of Counsel for Respondents.

CERTIFICATE OF MAILING.

I hereby certify that I am of counsel for the Respondents and on this date mailed five copies of the foregoing brief to Hon. Philip B. Perlman, Solicitor General of the United States, Washington, D. C.

This the .... day of November, 1951.

.....,
J. McHENRY JONES.